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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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[fol. a] [Caption omitted]

[fol. 1]

IN CIRCUIT COURT OF FLOYD COUNTY

TOBE STAPLETON, Suing by and in the Name of His Statutory Guardian, MARION STAPLETON, Plaintiffs,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant

PETITION—Filed June 12, 1926

The plaintiff, Tobe Stapleton, suing by and in the name of his Statutory guardian, Marion Stapleton, says that he is a citizen and resident of Floyd County, Kentucky, and under the age of 21 years; that Marion Stapleton, his Statutory Guardian, is likewise a citizen and resident of said county and state, and is free from all disability; that heretofore and on the — day of April, 1926, the said Marion Stapleton, by an order of the Floyd County Court of Floyd County, Kentucky, was appointed guardian of the person and estate of the said Tobe Stapleton, and thereupon qualified and is now acting as such guardian. Plaintiff files herewith as a part hereof copies of the orders of said Court, showing the said appointment and qualifications of the said Marion Stapleton as said Guardian, and marks the same Exhibit "A."

[fol. 2] The plaintiff says that heretofore and on the first day of October, 1925, and at all times mentioned herein, the defendant, Chesapeake and Ohio Railway Company, was and is a corporation, created, organized and existing under and by virtue of the laws of the State of Virginia, and as such has power among other things to sue and be sued, contract and be contracted with, plead and be impleaded in its corporate name, and to do all things necessary in operating, conducting, and carrying on its line of railroad, and that the said defendant is now and was at the time of the injury hereinafter complained of engaged in maintaining, operating and conducting a line of railroad from the State of Virginia, West Virginia and into Ken-

tucky, as well as through other states, and was at said time, and at all times mentioned herein, engaged in Interstate Commerce, and said defendant was at said time and now a common carrier for hire, and that it does now and did at the time of the injury complained of herein run and operate said line of railroad through Floyd County, Kentucky; that it is necessary and the defendant, Chesapeake and Ohio Railway Company, keeps in its employment men, including this plaintiff, who are and were at all times men-[fol. 3] tioned herein engaged in keeping up, repairing and maintaining its railroad line, switches and road bed which is used by it in transporting freight and passengers, in carrying on its business in Interstate Commerce, from one state to another through the State of Kentucky into the states of Virginia, West Virginia and other states of the United States of America.

The plaintiff says that heretofore and on the 30th day of August, 1925, and while the defendant was so engaged in Interstate Commerce, that he, Tobe Stapleton, who was at that time under the age of 16 years, was engaged and employed by the defendant, Chesapeake and Ohio Railway Company, as a section hand, and it was a part of his duty to carry water to the other employees of said defendant, who were likewise engaged in repairing and maintaining said railroad, line, switches and road bed, and that on said day, and while this plaintiff was working for the said defendant in the capacity of a section hand, he was directed by the foreman in charge of him and the other men to carry a bucket of water to the section hands, who were then engaged in their work for the defendant, Chesapeake and [fol. 4] Ohio Railway Company, and engaged in Interstate Commerce, and while he was so engaged in his work in carrying water and repairing defendant's road bed, track and switches together with the other employees, he was engaged in said work as a section hand and working in Interstate Commerce, and under a Federal Statute commonly known as the Federal Employers' Liability Act.

The plaintiff says that while he was so engaged in Interstate Commerce, and while working for the defendant, Chesapeake & Ohio Railway Company, who was likewise engaged in Interstate Commerce, he was directed by the foreman in charge of the section men where he was at work

and who was superior in authority to this plaintiff, to go and bring the other employees of the said defendant, who were working as section hands, a bucket of water; that when he went for the water at the direction of the said foreman, this plaintiff went between the cars of a train that was then standing on one of the railroad switches maintained by the said defendant, and that when he was between said cars of said train, the defendant by and through its agents, [fol. 5] servants, and employees in charge of and operating said train and cars, negligently and carelessly backed up said train, and ran over and upon this plaintiff, and bruised and mashed his hand off, broke and bruised his leg, and otherwise injured him on his body, arms, hands and legs; that he sustained thereby a permanent injury which caused him to suffer great and excruciating pain and mental anguish, and from the effects of which he lingered and suffered for more than five months; that said injuries mentioned and complained of herein were sustained by him on account of the wrongful and negligent acts of the defendant, its agents, servants and employees in employing this plaintiff in open violation of law.

Plaintiff says that the employment of the said Tobe Stapleton, by the defendant, Chesapeake & Ohio Railway Company was at the — when the said Tobe Stapleton was only fifteen years of age, and was in violation of section 331a9 of the Kentucky Statutes, and against the law, which fact was known by the defendant, its agents and employees at the time of said injury and employment, and by reason of the unlawful employment of the said Tobe Stapleton, he was injured as set out herein, and the employment [fol. 6] of this plaintiff and permitting him to work for the said defendant at the time and before his injury was within its self negligence on the part of the defendant, Chesapeake and Ohio Railway Company.

Plaintiff further says that at the time he was injured as set out herein he was earning $3.20 per day working for the defendant, and that he had been earning said amount for sometime before said injury, and that he had been prior thereto working full time, that of six days per week, and was earning and being paid $3.20, for each day he so labored for defendant. That he is unable to do any kind of labor or to earn any money at the same kind of work he

was doing or at any kind of manual labor, and will forever be so incapacited.

Plaintiff further says that by reason of the facts hereinbefore set out, and on account of the fact that he has sustained said injuries mentioned herein, on account of the negligent and wrongful acts of the defendant, its agents, and employees, he has been damaged in the just and full sum of $25,000.00.

Wherefore plaintiff prays judgment against the defendant, Chesapeake & Ohio Railway Company, in the sum of $25,000.00, in damages, and for all cost, proper and appropriate relief.

[fol. 7] Tobe Stapleton, by Marion Stapleton, His Guardian, by B. M. James & Joe Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 8] In Circuit Court of Floyd County

Summons and Return

The Commonwealth of Kentucky to the Sheriff of Floyd County:

You are commanded to summons Chesapeake and Ohio Railway Company to answer, in ten (10) days after the service of this summons, a petition filed against it in the Floyd Circuit Court, by Tobe Stapleton, suing by and in the name of his statutory Guardian, Marion Stapleton, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within ten (10) days after the service thereof to the Clerk's office of said Court.

Given under my hand, as Clerk of said Court, this 12 day of June, 1926.

Henry Stephens, Clerk, by W. C. Goble, D. C.

Officer's Return

Executed the within summons on the C & O Railway Company by delivering to Lon Moles a true copy hereof and he being the regular ticket agent nearest the county seat.

[fol. 9] This the 17 day of June, 1926.

T. Y. Martin, Sheriff, by A. B. Meade, D. S.

In Circuit Court of Floyd County

[Title omitted]

Minute Entry—Sept. 6, 1926

The defendant, The Chesapeake and Ohio Railway Company, produced, and filed motion and moved the court to require the plaintiff to execute bond for costs and submitted upon said motion.

[fol. 10] In Circuit Court of Floyd County

[Title omitted]

Motion to Require Plaintiff to Execute Cost Bond—Filed Sept. 6, 1926

Comes now the defendant, The Chesapeake & Ohio Railway Company, and moves the court to require the plaintiff to execute a bond for costs.

Wherefore, the defendant prays the judgment of the court upon said motion.

Combs & Combs, Kirk, Kirk & Wells, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

MINUTE ENTRY—Sept. 6, 1926

The defendant, The Chesapeake and Ohio Railway Company, filed motion and moved the court to strike certain allegations from the plaintiff's petition herein, as set out in said motion and submitted upon said motion.

IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 6, 1926

Comes the defendant, the Chesapeake and Ohio Railway Company, and moves the court to strike from this petition [fol. 12] of the plaintiff the following allegations therein contained.

"Plaintiff says that the employment of the said Tobe Stapleton by the defendant, Chesapeake and Ohio Railway Company, was at a time when the said Tobe Stapleton was only fifteen years of age, and was in violation of Section 3311a9 of the Kentucky Statutes, and against the law, which fact was known by the defendant, its agents and employees at the time of said injury and employment, and by reason of the unlawful employment of the said Tobe Stapleton, he was injured as set out herein, and the employment of this plaintiff and permitting him to work for the said defendant at the time and before the injury was within itself negligence on the part of the defendant, Chesapeake and Ohio Railway Company," because said allegations do not constitute or support a cause of action in favor of plaintiff, and are immaterial and irrelevant to the cause of action stated in the petition.

Combs & Combs, Kirk, Kirk and Wells, Counsel for Defendant.

[File endorsement omitted.]

[fol. 13] IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

MINUTE ENTRY—Oct. 28, 1926

Came this day the plaintiff, Tobe Stapleton, and Marion Stapleton, next friend, and produced, which is ordered filed their separate affidavits in resistance to the defendant's motion for bond for costs herein.

IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

AFFIDAVIT OF TOBE STAPLETON—Filed Oct. 28, 1926

The affiant Tobe Stapleton says that he is the same Tobe [fol. 14] Stapleton who sues in this case by and in the name of his statutory guardian, Marion Stapleton; that he (Tobe Stapleton is an infant under the age of twenty one years; that he can not obtain any one who will appear as his statutory guardian or next friend, other than his present statutory guardian, Marion Stapleton; that no one will agree, who is solvent, to be substituted in place of his present statutory guardian, Marion Stapleton; that the said Marion Stapleton is insolvent, and has no property in this state or elsewhere subject to execution, and that the said Stapleton is therefore unable to execute bond for costs.

Affiant further says that he is insolvent and has no property in this state or elsewhere subject to execution, and that he can not execute bond for costs.

Tobe (his mark) Stapleton.

Subscribed and sworn to before me by Tobe Stapleton, this the 20 day of October, 1926. B. M. James, Notary Public, Floyd County, Kentucky.

[fol. 15] In Circuit Court of Floyd County

[Title omitted]

Affidavit of Marion Stapleton—Filed Oct. 28, 1926

The affiant Marion Stapleton says that he is the statutory guardian for Tobe Stapleton, and that he is prosecuting this action for the use and benefit of the said Tobe Stapleton; that said Tobe Stapleton is an infant under the age of twenty one years; that this affiant can not procure any solvent person, or any one who has property in this State or elsewhere to agree to act as guardian for the said Tobe Stapleton or to prosecute this suit as the next friend of the said Tobe Stapleton; that is he could secure a solvent person to act as guardian or next friend, he would give up his appointment as statutory guardian for the said Tobe Stapleton.

Affiant says that he (Marion Stapleton) is insolvent, and has no property in this state or elsewhere subject to execution, and that he can not execute a bond for costs, and [fol. 16] respectfully asks the Court to allow him to prosecute this action in forma pauperis.

Marion Stapleton.

Subscribed and sworn to before me by Marion Stapleton, this 20 day of October, 1926. B. M. James, Notary Public, Floyd Co., Ky.

[File endorsement omitted.]

In Circuit Court of Floyd County

[Title omitted]

Order Overruling Motion to Strike—Feb. 17, 1927

This cause having been submitted to the court upon written motion filed herein on the 6th day of September 1926, [fol. 17] to strike certain matter from plaintiff's petition herein, which is fully set out in said motion, and coming on to be heard and being considered by the court, the same is

overruled to which ruling of the court the defendant objects and excepts.

IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

MINUTE ENTRY OF ORDER OVERRULING DEMURRER TO ANSWER, ETC.—Feb. 18, 1927

Came this day the defendant by counsel and produced, which is ordered filed its answer herein. Thereupon came the plaintiff by counsel and produced, which is ordered filed demurrer to each and every paragraph of defendant's answer herein, and same being submitted to the court, heard and considered, the same is overruled to which ruling of the court the plaintiff objects and excepts.

[fol. 18] Upon motion of attorney for plaintiff and by agreement, it is ordered that the answer herein be and the same is now traversed. Upon motion of attorney for defendant, it is ordered that the proceedings of the trial of this case be reported by C. P. Stephens, Reporter herein.

IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

ANSWER—Filed Feb. 18, 1927

Comes now the defendant, Chesapeake & Ohio Railway Company, and for answer to the plaintiff's petition herein states:

That it is untrue and it denies that on the 1st day of October, 1925, that at the time of the alleged injury complained of by the plaintiff, he was under the age of sixteen years or that it was a part of his duty as a section hand while in [fol. 19] the employment of the defendant company to carry water to other employees of said defendant who were engaged in repairing and maintaining the defendant's rail-

road line, switches or road bed of that on said day or while the plaintiff was working for the said defendant in the capacity of a sectionhand, was directed by the foreman in charge of him and the other men to carry a bucket of water to the section-hands who were then engaged in and working for the defendant, The Chesapeake & Ohio Railway Company. Defendant denies that while the plaintiff was engaged or while working for the defendant, The Chesapeake & Ohio Railway Company, was directed by the foreman in charge of the section men where he was at work or who was superior in authority to the plaintiff to go and bring for the other employees of said defendant Company who were working as section-hands, a bucket of water. Denies that he went for the water for the said foreman or that he went between the cars of the train that was then standing on one of the railroad switches of the defendant or that he was between said cars of said train when said defendant, by or through its agents, or servants, or employees in [fol. 20] charge of or operating said train or cars, negligently or carelessly backed up said train or ran over or upon the plaintiff or bruised or mashed his hand off or broke or bruised his leg or otherwise injured him on his body, or arms or hands, or legs. It denies that the plaintiff sustained thereby a permanent injury or has caused him to suffer great or any excruciating pain or mental anguish or from the effects of which he lingered or suffered for more than five months or anything like said period of time. Denies that said alleged injury mentioned and complained of by the plaintiff herein in his petition were sustained by him on the account of the alleged wrongful or alleged negligent acts of the defendant or its agents, or servants, or employees in employing plaintiff in open violation of law or that it employed the plaintiff in open violation of the law.

Denies that the employment of the said Tobe Stapleton by the defendant, The Chesapeake & Ohio Railway Company, was at a time when the said Tobe Stapleton was only fifteen (15) years of age, or that his employment was in violation of Section 331 A-9 of the Kentucky Statutes or was against the law, or which fact was known by the de- [fol. 21] fendant, its agents, or employees at the time of the said injury or employment. Denies that by reason of alleged unlawful employment of the said Tobe Stapleton,

he was injured as set out in his petition or that the employment of the plaintiff or permitting him to work for the said defendant at the time or before his alleged injury was in itself negligence on the part of the defendant, the Chesapeake and Ohio Railway Company.

Defendant denies that at the time of the plaintiff's injury as set out in his petition plaintiff was earning Three Dollars and Twenty ($3.20) cents per day, working for the defendant of that he had been earning said amount for some time before said injury or that he had been prior thereto, working full time, that of six days per week or was earning or being paid said Three Dollars and Twenty ($3.20) Cents for each day he so labored for defendant. Denies that the plaintiff is unable to do any kind of labor or to earn any money at the same kind of work he was doing or that he is unable to earn money at any kind of manual labor, or that he will forever be incapacitated.

[fol. 22] Defendant denies that by reason of alleged facts set out in the plaintiff's petition or on account of the fact he has sustained said alleged injuries mentioned in his petition or on account of the alleged negligent or alleged wrongful acts of the defendant, its agents, or employees, he has been damaged in the just or full sum of Twenty-five Thousand ($25,000.00) Dollars, or any sum or amount.

Paragraph II

For further answer the defendant herein states that at the time and place complained of in the plaintiff's petition, Tobe Stapleton was himself guilty of negligence which contributed to, caused and brought about all of the injury of which he complains, if any he received and that but for which said negligence contributing thereto, the injuries and none of them would have been received by him.

Paragraph III

[fol. 23] Defendant, for further answer herein, says that at the time and on the occasion referred to in the plaintiff's petition said plaintiff was and had been for a long time prior thereto, employed by the defendant as a section-hand; that the train referred to in the plaintiff's petition was manned by — careful, experienced and skillful engineer and

by a careful, experienced and skillful brakeman, all of whom were selected by the defendant on account of their fitness for the work and from their experience therein; and defendant says that at the time plaintiff received the alleged injuries set out in his petition, said train was being operated in a reasonable, careful and prudent manner; that plaintiff, Tobe Stapleton was an employee of this defendant, and that in entering and remaining in the service of the defendant he assumed certain risks and dangers incident to the service; and by his contract of service with this defendant he assumed all the ordinary risks and dangers incident to his employment, among which was the risk of injury set up in the plaintiff's petition in working in, about or around railroad, trains or railroad cars, as a section hand; that the alleged injuries to plaintiff referred to in the petition herein were among the risks assumed by [fol. 24] the plaintiff in entering the employment of defendant, as incident to his service and to the operation of railroad trains, in the handling of cars and his work as a section hand and the business of railroading engaged in by plaintiff; that said injuries, if received, could not have been avoided by the exercise of ordinary care of skill on the part of the defendant's agents, or servants, or employees or any of them in charge of said train; but that said injuries, if received, was a risk assumed by the plaintiff as a part of the terms of his employment and defendant pleads and relies upon the facts herein set up as a bar to plaintiff's right of recovery herein.

Wherefore, having fully answered, the defendant prays that the plaintiff's petition herein be dismissed, for all cost and all proper relief.

Combs & Combs, Kirk, Kirk & Wells, Attorneys for Defendant.

[fol. 25] [File endorsement omitted.]

[fol. 26] In Circuit Court of Floyd County

[Title omitted]

Demurrer to Answer—Filed Feb. 18, 1927

Comes the plaintiff, Tobie Stapleton, by his Guardian, and demurs to each and every paragraph of defendants an-

swer herein, and for cause assigns, that the same nor neither paragraph thereof sustains or maintains a defense to plaintiffs petition.

Tobe Stapleton, by James & Hobson, Attorneys.

[fol. 27] In Circuit Court of Floyd County

[Title omitted]

Judgment—Feb. 18, 1927

This cause coming on to be heard, came both plaintiff and defendant by their counsel and announced ready for trial, and thereupon came the following jury to-wit: Johnathan Fitzpatrick, Ed. Harris, Oscar Miller, Lee Robinson, Jonce Osborn, Melvin Wells, Will Previtt, Bonnie Sword, Will Miller, Grant Greene, Willie A. Baldridge and George A. Burchett, who were duly impaneled, accepted and sworn, and after hearing statements of the case and all the evidence as offered and instructions of the court, the jury retired and presently returned into court the following verdict to-wit: "We, the jury do agree and find for plaintiff in the sum of $17,500.00. Melvin Wells, one of the jury."

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the sum of Seventeen Thousand Five ($17,500.00) Hundred Dollars with 6% in-
[fol. 28] terest thereon from the 18th day of February 1927 until paid, together with all his costs herein expended for which execution may issue. To this judgment the defendant objects and excepts and prays an appeal to the court of appeals, which is granted.

In Circuit Court of Floyd County

Defendant's Requested Instructions to Jury Given

Instruction No. 1

The Court instructs the jury that when the plaintiff entered into the service of the defendant as a section hand he

assumed all the ordinary risks incident to the employment and if you shall believe from the evidence that the injury of which the plaintiff complains, were caused by the ordinary risks of the employment which he had assumed and not by reason of negligence of the defendant as set out in Instruction No. 2 then the law is for the defendant and you should so find.

[fol. 29] Instruction No. 2

Contributory negligence is the negligent act of the plaintiff, which concurring and co-operating with the negligent act of a defendant for the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such an employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence of the plaintiff is not a bar to a recovery but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant. If the defendant relies on the defense of contributory negligence, the burden is upon it to establish that defense by a perponderance of the evidence.

[fol. 30] In Circuit Court of Floyd County

Plaintiff's Requested Instructions to Jury Given

Instruction No. 3

The Court instructs the Jury that if they believe and find from the evidence that the defendant Chesapeake and Ohio Railway Company employed the plaintiff to work for it as a section hand at a time when he was under sixteen years of age, and if they further believe and find from the evidence that the plaintiff while working for it as a section hand in the course of said employment, was injured at a

time when he was under the age of sixteen years, then the law is for the plaintiff, and the jury will so find. Unless they so believe they will find for the defendant.

Instruction No. 4

If the jury find for the plaintiff they will find for him by measure of damages such a sum of money as will fairly and reasonably compensate him for any mental or physical suffering, if any, or either, and for any permanent impair- [fol. 31] ment or reduction of his power to earn money, which the jury believes from the evidence was the proximate and direct cause of the injuries, if any, which plaintiff claims to have received on the occasion mentioned by the witnesses, if on said occasion, he did receive any injuries, not to exceed in all the sum of $25,000.00 the amount claimed in the petition.

Nine or more of the jury may make a verdict, but if a less number than the whole panel agree, those agreeing thereto must sign the verdict.

In Circuit Court of Floyd County

[Title omitted]

Order Overruling Motion for New Trial—Feb. 18, 1927

Came the defendant, the Chesapeake and Ohio Railway Company, by counsel, and filed motion and grounds for a new trial herein, to the granting of which plaintiff objected. [fol. 32] This cause being submitted upon defendant's motion and grounds for a new trial and same having been duly heard and considered the court, advised, overruled same to which the defendant excepted and prays an appeal to the Court of Appeals which is granted. Upon defendant's further motion it's time for filing Bill of Exceptions herein is ordered to be and is now extended until and including the 24 day of the next regular term of this court and C. P. Stephens, the official court stenographer herein is ordered and directed to extend his shorthand and stenographic notes of all the proceedings and evidence taken and introduced during the trial hereof into typewriting and to

file same in connection with and as a part of defendant's Bill of Exceptions on or before the 24th day of the next regular term of this court.

[fol. 33] IN CIRCUIT COURT OF FLOYD COUNTY

[Title omitted]

MOTION FOR NEW TRIAL.—Filed Feb. 18, 1927

Comes the defendant, the Chesapeake and Ohio Railway Company, and moves the court to set aside the verdict herein and grant defendant a new trial upon the following grounds:

1. Because the court erred in refusing to admit competent and relevant evidence offered by the defendant, to which ruling of the court the defendant at the time excepted and still excepts.

2. Because the court erred in admitting incompetent and irrelevant evidence offered by the plaintiff to which ruling of the court the defendant at the time objected and excepted and still objects and excepts.

3. Because the verdict is not sustained by sufficient evidence.

[fol. 34] 4. Because the verdict is contrary to law and the evidence.

5. Because the court erred in refusing to give a peremptory instruction offered by the defendant at the conclusion of plaintiff's evidence directing the jury to return a verdict for the defendant, to which ruling of the court in refusing to give said instruction the defendant at the time excepted and still excepts.

6. Because the court erred in giving instructions 3 and 4 offered by the plaintiff, to the giving of which defendant objected and excepted at the time and still objects and excepts.

7. Because the damages awarded by the verdict of the jury are excessive, appearing to have been given under the influence of passion or prejudice.

Defendant says that the errors above set forth materially affects its substantial rights.

Wherefore, &c.

Kirk Kirk & Wells, Combs & Combs, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 35] Supersedeas bond on appeal omitted in printing.

[fol. 36] In Circuit Court of Floyd County

[Title omitted]

Supersedeas on Appeal

I do certify that an appeal has been granted by the Floyd
[fol. 36½] Circuit Court, from the judgment rendered at its February Term, 1927, in favor of Tobe Stapleton, by &c., Appellee, against C. & O. Railway Company, Appellant, said judgment being as follows: $17,500.00 with 6% interest from date of judgment, and costs of the action, and that a supersedeas bond has been executed. Therefore, the appellee and all others are commanded to state proceedings on the judgments above recited.

Witness my hand as Clerk of said Court, this 28th day of February 1927.

Henry Stephens, C. F. C. C., by W. C. Goble, D. C.

[fol. 37] In Circuit Court of Floyd County

[Title omitted]

Order Approving Bill of Exceptions and Evidence—May 9, 1927

Came the defendant, The Chesapeake & Ohio Railway Company, within the time allowed it, and tendered this, its

Bill of Exceptions, with transcript in duplicate of the official stenographer's report of the evidence, and, on its motion, said bill of exceptions is examined, signed, attested and approved by the Court and said transcript of evidence is examined, signed and attested and approved by the Court, and it is now ordered that they be filed and made a part of the record herein without being spread on the Order Book.

[fol. 28] In Circuit Court of Floyd County

[Title omitted]

Bill of Exceptions—Filed May 9, 1927

Before Honorable W. W. Williams and a Jury

Prestonsburg, Ky., February 18th, 1927.

Be it remembered that this case came on to be tried on the day and date above written, in the Circuit Court of Floyd County, Kentucky, before Honorable W. W. Williams, Judge of the Thirty first Judicial District of Kentucky, and a jury impaneled and sworn to try the issue joined. Messrs. James & Hobson appearing for the plaintiff, and M. C. Kirk and B. F. Combs appearing on behalf of the defendant; whereupon the following evidence was introduced by the parties and the following proceedings had, to-wit:

B. M. James, counsel for plaintiff, stated the case to the jury.

M. C. Kirk, counsel for defendant, stated the case to the jury.

[fol. 29] The plaintiff, to maintain the issue on his part, introduced the following witnesses: Tobe Stapleton, Marion Stapleton, and Hubert Baldridge.

These witnesses testified in chief for plaintiff, and their testimony, with objections and exceptions thereto, rulings of the Court thereon, and avowals of counsel, is shown in the official stenographer's transcript of evidence filed in

this case, marked "A", and made a part of this bill of exceptions by reference as if copied herein in full.

At the conclusion of plaintiff's evidence aforesaid, the defendant, by counsel, moved the Court to instruct the jury to find for defendant, to which motion, plaintiff, by counsel, objected. The Court sustained said objection and refused to so instruct the jury, to which ruling of the Court defendant excepted, and still excepts.

This was all the testimony offered by either party, heard by the jury or refused by the Court, on the trial of this cause.

At the conclusion of defendant's evidence, defendant by counsel, moved the Court to instruct the jury to find for defendant, to which motion plaintiff, by counsel, objected. The Court sustained said objection and refused to so instruct the jury, to which ruling of the Court the defendant excepted and still excepts.

[fol. 40] The Court then give to the jury the following instructions, marked 1, 2, 3, 4, and 5.

Instruction No. 1

The Court instructs the jury that when the plaintiff entered into the service of the defendant as a section hand he assumed all the ordinary risks incident to the employment, and if you shall believe from the evidence that the injury of which the plaintiff complains was caused by the ordinary risks of the employment which he had assumed, and not by reason of negligence of the defendant as set out in Instruction No. 2, then the law is for the defendant and you should so find.

Instruction No. 2

Contributory negligence is the negligent act of the plaintiff, which concurring and cooperating with the negligent act of the defendant, for the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such an employee. So, if you

reach that point in your deliberations where you find it [fol. 41] necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it does by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant. If the defendant relies on the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.

Instruction No. 3

The Court instructs the jury that if they believe and find from the evidence that the defendant, Chesapeake and Ohio Railway Company, employed the plaintiff to work for it as a section hand at a time when he was under sixteen years of age, and if they further believe and find from the evidence that the plaintiff while working for it as a section hand, in the course of said employment was injured at a time when he was under the age of sixteen years, then the law is for the plaintiff, and the jury will so find. Unless they so believe, they will find for the defendant.

Instruction No. 4

If the jury find for the plaintiff, they will find for him by measure of damages such a sum of money as will fairly and reasonably compensate him for any mental or physical suf- [fol. 42] fering, if any, or either, and for any permanent impairment or reduction of his power to earn money, which the jury believe from the evidence was the proximate and direct cause of the injuries, if any, which plaintiff claims to have received on the occasion mentioned by the witness, if on said occasion he did receive any injuries, not to exceed in all the sum of $25,000.00, the amount claimed in the petition.

Instruction No. 5

Nine or more of the jury may make a verdict, but if a less number than the whole panel agree those agreeing thereto must sign the verdict.

Defendant, the Chesapeake and Ohio Railway Company, objected to the giving of instructions 1, 2, 3, 4, and 5 and each of same. The Court overruled said objection and gave

to the jury, over the objection of said defendant, Instruction- 1, 2, 3, 4 and 5, to which action of the Court, defendant excepted and still excepts.

The foregoing instructions are all the instructions offered by either party, refused by the court or given by the Court in the trial of this cause.

Came the defendant, The Chesapeake & Ohio Railway Company, and tendered this its bill of exceptions, with [fol. 43] transcript in duplicate of the official stenographer's report of the evidence, and on its motion said bill of exceptions is examined, signed, attested and approved by the Court, and said transcript of evidence is examined, signed and attested and approved by the Court, and it is now ordered that they be filed and made a part of the record, without being spread on the order book; and it is now certified that this bill of exceptions, with said stenographic report of evidence contains all the evidence in this case.

Approved this the 9 day of May, 1927.

W. W. Williams, Judge Floyd Circuit Court.

[File endorsement omitted.]

[fol. 44] In Circuit Court of Floyd County

[Title omitted]

Præcipe for Transcript of Record

The clerk of the Floyd circuit court is hereby directed and requested to copy for the defendant, The Chesapeake and Ohio Railway Company, for use on appeal to the Court of Appeals of Kentucky, the entire record in the above styled cause, except the subpœnaes and attachments for witnesses and the official reporter's bill of evidence.

This May 9th, 1927.

The Chesapeake and Ohio Railway Company, by Kirk, Kirk & Wells, Combs & Combs, Attorneys.

[fol. 45] Clerk's certificate to transcript omitted in printing.

[fol. 46] In Circuit Court of Floyd County

[Title omitted]

Statement of Evidence—Filed May 9, 1927

Caption

Be it remembered that on the calling of this cause came the plaintiff, Tobe Stapleton, in his own proper personal and by attorneys, and announced ready for trial. Thereupon came the defendant, by counsel, and announced ready for trial. Thereupon a jury of twelve was duly selected, impanelled and sworn to try the issue joined in said cause.

Thereupon the case for the plaintiff was stated to the jury by Hon. B. M. James; and for the defendant by Hon. M. C. Kirk.

Thereupon came the plaintiff and was duly sworn as a witness in his own behalf, and testified as follows, to-wit:

Direct examination by Mr. B. M. James:

Q. Your name is Tobe Stapleton?

A. Yes.

[fol. 47] Q. Where do you live?

A. Over on Abbott.

Q. Where did you live on the first of October, 1925?

A. Lived at the depot.

Q. You mean over at the depot in West Prestonsburg next the depot in the section house that is located there?

A. Yes.

Q. You are a son of Marion Stapleton, I believe?

A. Yes.

Q. How old were you on October 1, 1925, at the time you were injured?

A. As far as they always told me I was fifteen years old.

Q. Were you employed by the Chesapeake and Ohio Railway Company at the time you were injured?

A. Yes.

Q. What kind of work did you do for the company?

A. Carried water. When I wasn't carrying water I was shovelling and digging with picks.

Q. The same as the other section men?

A. Yes.

Q. You remember what time of day it was when you were injured?

A. It was in the morning.

Q. What time did you go to work that morning?

A. Seven o'clock.

[fol. 48] Q. What did you do first when you started to work?

A. Went after a bucket of water.

Q. Had you been directed by anyone to go after water every morning when you went to work?

A. No, sir.

Q. At the other mornings when you were first employed were you directed to get water for the men who were working?

A. Yes, sir.

Q. Who directed you to carry water when you were employed there by the company?

A. My father.

Q. What was your father doing for the railroad company?

A. He was working for them.

Q. What kind of work?

A. Running the section.

Q. Was he section foreman?

A. Yes.

Q. How long had you been working?

A. Well, about nine months.

Q. Did you always the first thing you would do every morning carry the water?

A. Yes sir.

Q. Had he directed you to do that from the very first up until you were injured?

A. Yes sir.

[fol. 49] Q. What kind of train was it you were injured by?

A. Freight train.

Q. Was that a coal train that carried coal out of the river.

A. Yes.

Q. Go on now, son, and tell the jury just how it was you got injured?

A. Well, when I went after the bucket of water, the train wasn't sitting there, and while I was gone after the water it pulled up and just before I got back, just when I got

nearly up to the train I heard the passenger whistle and I knowed I couldn't go on, and it was too long for the side tracks and it pulled up and was backing up for the passenger train and I didn't know it and it run and caught me.

Q. Was it stopped when you started under it? You mean this freight train was standing on the side track stopped?

A. Yes.

Q. You heard the passenger coming in on the main line?

A. Yes.

Q. Did you know they were going to start out this freight train?

A. No sir.

Q. Did they give any signal or warning before they [fol. 50] started?

(Defendant objected, the court overruled the objection, to which defendant excepted.)

A. No, sir.

Q. What signal or warning, if any, were given by this train crew when they started the train?

A. None.

Q. Did you hear any whistle blowed?

A. No, sir.

Q. Bell ringing?

A. No, sir.

Q. The place you were injured was over in West Prestonsburg near the depot?

A. Just below the depot.

Q. Now, where was the other section men working at the time you were injured?

A. Just across the track.

Q. From where you were?

A. Yes.

Q. How many men were they working along there?

A. I don't know exactly how many.

Q. Do you know how many there was working there?

A. Seven or eight as far as I can remember.

Q. Were they working in plain view of the track up and down the railroad?

A. Yes.

[fol. 51] Q. What injuries did you receive there when the train run over you, if any? How were you hurt? Show the jury. Stand up and let the jury see your hand.

(Witness here exhibits wounds to the jury.)

Q. Is that the hand you were injured in?

A. Yes.

Q. I believe your fingers are cut off up in the joints all of them except the thumb?

A. Yes, about the joint.

Q. Were you hurt anywhere else?

A. Yes sir.

Q. Which one of your hands was it that got cut off?

A. My right hand.

Q. Were you right handed?

A. Yes.

Q. Has your arm perished away any, your right arm?

(Objected to, sustained, withdrawn.)

Q. What is the condition of your arm, the one the fingers are cutf off on?

A. I believe it is smaller than the other one.

Q. What was its condition before the injury with regard to the other arm?

A. None.

Q. Was there any differen-t as to your two arms as to the size of them before the injury?

A. No, sir.

[fol. 52] Q. I believe you say your leg was injured?

A. My leg was broken.

Q. Which leg?

A. Right one.

Q. What part of the leg was it?

A. Up above the ankle.

Q. Can you show the jury the injury you got to your leg?

A. Yes sir.

(Witness shows jury.)

Q. Now, what did they do after you were injured, what did they do with you?

A. Took me to the hospital.

Q. Where did they take you?
A. To Paintsville.
Q. Who took you down there?
A. The section men, part of them.
Q. How long did you stay at the hospital?
A. Six weeks.
Q. Did you suffer from your leg and hand?
A. Yes sir.
Q. How much were you earning a day at the time you were injured?
A. $3.20.
Q. Were you being paid that by the defendant railway [fol. 53] company?
A. Yes sir.
Q. How did they pay you, in money or checks?
A. Checks.
Q. Where did those checks come from, do you know?
A. No, I don't.
Q. Do you know whether they were mailed from Ashland or Richmond?
A. No, I don't.
Q. Were they checks of the railway company?
A. Yes.
Q. State to the jury whether or not you have been able to work with your hand since you were injured?
A. Not much. Do just a little with it.

Cross-examination by Mr. Kirk:

Q. How old do you say you were at this time?
A. Fifteen years old.
Q. At the time you was hurt?
A. I was going on 16. I was fifteen the 20th day of September. I was hurt the first day of October.
Q. The September following then you were sixteen years of age?
A. Yes.
Q. How long had you been working under your father as section foreman?
[fol. 54] A. About nine months, ever since I have been working.
Q. What kind of work had you done furing that time?
Q. Carrying water, and what time I wasn't carrying water, shovelling and working just as the other men did.

Q. You mean to say that you used the shovel and pick and ballasted the track and did such work as was necessary to be done just the same as the other section men?

A. I carried water most of the time. Just once in a while when there wasn't any men out hardly and it didn't take much water, I would use the pick a little.

Q. You didn't carry water all the time you were on duty?

A. No, not all the time. Most of the time though.

Q. You say you were injured over here below the depot at Prestonsburg?

A. Yes.

Q. How far down the river was it from the depot you were injured?

A. Just a little bit below the tool house.

Q. How far would that be below the depot, how many hundred yards?

A. I don't know.

Q. Would it be two or three or four hundred yards below the passenger depot?

A. I guess it would.

[fol. 55] Q. Where was the men working when you went after the water?

A. They were working just right on the upper side of the track ditching.

Q. Between the railroad and the hillside?

A. Yes.

Q. Did any of them know you had gone after the water?

A. Yes.

Q. Who knew it?

A. I guess all of them knew it.

Q. Do you know now that any of them knew you had gone, your father or any other of the men working with you, that they knew where you had gone?

A. No, I don't know.

Q. You just voluntarily went to the toolhouse on that morning and got a bucket to get water in and went over to the spring to bring some water for the section men?

A. Yes sir; just as I had always done.

Q. You would do that every morning?

A. Yes.

Q. Where had you worked with your father during the nine months that you had been working?

A. Prestonsburg section.

Q. Where does that extend to and from what points?

A. From right up here at Colonial I think to down this side of Auxier.

[fol. 56] Q. That would be about half a mile above Prestonsburg?

A. I guess it would be a little over half a mile.

Q. Your father then had charge of about five or six miles of section?

A. Yes.

Q. And you went with him during this employment on different parts of the section, and performed the kind of work you describe to the jury?

A. Yes.

Q. You was frequently employed around the depot and below it there on this double track, wasn't you, the side track that was built there?

A. Yes sir.

Q. How long is that side track or passing track from the depot down the river?

A. Well, it is over half a mile I guess.

Q. Isn't it about a mile or more?

A. It ain't quite a mile.

Q. During the nine months that you had worked for your father or for the railway company under him as section foreman, you had worked around about the same places where you had worked before you were injured?

A. Just over all the track.

Q. You knew that freight trains frequently passed on that siding, didn't you?

[fol. 57] A. No, sir.

Q. Hadn't you never seen any freight train on that siding before?

A. I had seen them on that siding the passenger was coming and I knowed it couldn't go on.

Q. I will ask you if it isn't a fact that a great many freight trains pass on that passing track and by this depot?

A. Yes.

Q. You knew that a freight train or passenger train was subject to move at any time, didn't you?

A. Yes.

Q. But you thought this one wouldn't move, because the passenger train was there?

A. Yes.

Q. Was the passenger train over there) was this train waiting for it to come?

A. It was waiting for it to come.

Q. You thought because you heard the passenger train whistle that it would wait for it to come in before it moved out?

A. I knowed it wouldn't go on.

Q. Did you think it wouldn't move?

A. No.

Q. You thought it would or might move?

[fol. 58] A. No, I didn't think anything about it.

Q. You didn't have any thought about it?

A. No sir.

Q. While the freight train was standing and before the passenger train come down, you attempted to go under the car?

A. Yes sir.

Q. And while you was under the train with your water the train moved?

A. Yes.

Q. And caught you as you have described to the jury?

A. Yes.

Q. Now, was this freight train standing there when you went after the water?

A. No, sir.

Q. Where was it?

A. It pulled up while I was gone after water.

Q. Did you hear it before you went after water?

A. Yes, it pulled up and stopped while I was after water.

Q. How far was the spring where you got water from the railroad track?

A. Down under the river bank.

Q. How close?

A. Pretty close.

Q. Ten or fifteen feet?

—, —— ——.

[fol. 59] Q. Could you see the frieght train coming up the river when you was there down under the bank?

A. No, sir.

Q. You made a written statement of how this accident occurred, didn't you?

A. Yes.

Q. Didn't you say in that written statement that when you started with the bucket to get a bucket of water that the train was standing on the track?

A. No, sir; it was not on the track.

Q. And you crossed between the cars and got the bucket of water, and while you was getting the water the freight train pulled out on the main track some little distance—Did you think that?

A. That wasn't the way I made it.

Q. What did you say about that?

A. I told him that while I was gone after the water it pulled up.

Q. Do you mean that when you started back with the water that you thought the train would remain on the track, there?

A. Yes sir.

Q. And you started to crawl under the car?

A. Yes.

Q. We will say this table represents the car. Show the [fol. 60] jury about what part of the car you was crawling under?

A. Right in the middle of it.

Q. Right in the middle of the car?

A. No, right between, right where it couples.

Q. Then you was between the two cars?

A. Yes.

Q. Was you crawling down under the draw-heads on your all fours at the time you got hurt?

A. Just bent over to go under.

Q. Did you have your water in your hand at that time?

A. Yes.

Q. About how many cars was you back from the engine at the time you was crawling through?

A. I don't know about how many.

Q. Forty *o*f fifty?

A. Yes, I guess about that many.

Q. How much you say you were being paid per day for your labor?

A. Three dollars and twenty cents.

Q. Was that the usual price paid all the men for their labor?

A. Yes.

Q. You was getting as much as the other men working?

A. Yes.

Q. Did you work pretty steady?

A. Yes.

[fol. 61] Q. Did you work practically during all the year?

A. All the year. I didn't work a year.

Q. All that year that you did work you work pretty steady during that time?

A. Yes sir; I was off two or three weeks I think.

Q. Did you work during the winter time?

A. Yes.

Q. Where did your father live at that time?

A. Down here right over from the depot.

Q. During part of that time didn't you go to school over there?

A. Part of the time. Two weeks I went to school.

Q. What made you quit school?

A. I don't know how come me to quit school.

Q. Did your father tell you to quit school and go to work on the section?

A. I don't remember whether he told me to or not.

Q. Did he make any objection to your working on the section?

A. He told me to go back to work if I wanted to.

Q. Your father told you to go back to work if you wanted to.

A. He told me to go back to work. He didn't say anything about wanting me to.

[fol. 62] Q. Anyway, you left school and went to work on the section for your father, is that correct?

A. Yes.

Q. What kind of work have you been doing since you were injured?

A. Worked in the mines a little while.

Q. How much are you earning in the mines?

A. Board and clothes.

Q. How long have you worked?

A. Just work for my board and clothes.

Q. Who gives you board and clothes for your work?
A. My dad.
Q. And don't you know how much you earn?
A. No, sir.
Q. Who pays you for that work?
A. I just go in and help him.
Q. Do you know whether or not anybody pays your father for the work you do?
A. No, they just pay him for what he does and I help him.
Q. Nobody don't pay you for your work?
A. No, sir.
Q. Haven't you been going to school any since you got injured?
A. No, sir.
Q. What kind of work does your father do?
[fol. 63] A. He works in the mines now.
Q. Does he load coal?
A. Yes sir.
Q. Now, your work with your father is what they denominate "back hand," helping him load coal?
A. I help him work, help him push cars out.
Q. Your father gets so much a ton?
A. Yes.
Q. He gets the pay for the work you and him do in loading coal?
A. Yes.
Q. You still live with your father and he buys your clothes and food?
A. Yes.
Q. You knew it was dangerous to crawl under a freight train, didn't you?
A. No, I didn't.
Q. Hadn't your father told you time and again that was dangerous and never to do that?
A. No, sir.
Q. Never did?
A. Not as I know of.
Q. Didn't you consider a freight train dangerous?
A. Not when they were sitting still.
[fol. 64] Q. Didn't you know when they were sitting still they were subject to move and then they would be dangerous?

A. No sir.
Q. You didn't know that?
A. No, sir.

Redirect examination by Mr. James:

Q. I believe you tell the jury you help your father push cars in and out of the mines, and ginn around a little bit?
A. Yes sir.
Q. You don't get any money for that?
A. No, sir.

Thereupon the plaintiff introduces the witness MARION STAPLETON, who, being first duly sworn, testified as follows, to-wit:

Direct examination by Mr. James:

Q. Your name is Marion Stapleton?
A. Yes.
Q. Father of Tobe Stapelton?
A. Yes.
Q. Where do you live, Mr. Stapelton?
A. I live over on Abott creek now about three miles.
Q. In October 1925 I believe you lived over here near the depot in the section house?
[fol. 65] A. Yes, sir; I lived in the C & O section house over here.
Q. What are you working at now?
A. I am mining a little now, working in the mines.
Q. You are not working on the railroad?
A. No, I ain't working any more.
Q. When did you quit work for the railroad company?
A. I believe they fired me about the 26th or 27th of August, I believe that was about the time, I don't remember exactly the date, but I believe it was about the 26th day of August.
Q. After you filed suit?
A. Yes.
Q. Were you present when your son was injured?
A. Well, yes, I was on the job that morning.
Q. What time did you take your men out to work?

A. Seven o'clock was our work time.

Q. How long had your son been working for the railroad company?

A. He had been on the payroll for about nine months, I think. But he hadn't worked all this time. When I would have a pretty good gang he would work and when I didn't have the men I would work him. I would cut my boy off [fol. 66] the job in preference of somebody else. He didn't work steady the whole nine months. I don't know exactly how much he did work.

Q. What did the railroad company pay him per day?

A. $3.20. That is section labor.

Q. Section labor for all the men who work on the section?

A. Yes, sir; all the same.

Q. What was his duties as section hand?

A. I lined the boy up that he could carry water. Takes about one man's time to carry water when I have got a good gang of men, and work around and do what he could the rest of the times he was not after water.

Q. Did he do any work?

A. He would shovel some and work around on the track.

Q. The same as the other men?

A. Yes.

Q. What did he do when he first went to work every morning?

A. Well, the boy we had lined him up that he knowed he had to carry this water and he would go ahead and get a bucket of water for the men—

Q. The first thing he would do every morning was to carry water for the men?

A. Yes.

Q. Now, Mr. Stapelton, I believe you were foreman of [fol. 67] the section crew for the Chesapeake & Ohio Railway Company?

A. Yes.

Q. What was your section, I mean, how long a section did you have?

A. Six miles, the main line, passing track and all side tracks along there Middle Creek, part of Middle creek and the track over in Blue Beaver.

Q. Was you working on this section that was allotted to you by the railway company at the time this boy was injured?

A. Yes, sir.

Q. Did you have full supervision of employing men? and the kind of work they did and all of that?

A. I was responsible for my men, I mean I could fire or hire them.

Q. Did you send in the amount of wages they were earning?

A. Yes.

Q. You had a right to fire and hire them irrespective of the kind of work they did?

A. That is what I was there for. If I hadn't been the company wouldn't have had me.

Q. How long had you been employed by the C & O at the [fol. 68] time this boy was injured?

A. I don't know. I expect in all I worked about fifteen years for the C. & O. I quit two or three times and worked at something else.

Q. The C. & O. Railway Company the defendant in this case?

A. Yes.

Q. The place where this boy was injured was then within the limits of your section of the railroad?

A. Yes sir.

Q. Now, I believe you say the boy had been working most of the time for about nine months for the defendant company?

A. Yes. He had been on the payroll, I believe it was about nine months. I wouldn't state exactly because I haven't got any record.

Q. Did any of the officers or employees who were higher up in authority than you know about the boy working for the railroad?

A. Yes sir; the supervisor, Robert Verder, knowed he was working.

Q. Was he superior in authority to you, Mr. Verder?

A. Yes.

Q. What was his duties?

A. He was over me the same as I was over the men. He [fol. 68½] could fire and hire me, what he told me to do that is what I was supposed to do.

Q. When did he find out the boy was working?

A. Well, I believe it was on the first part of January, 1925, if I ain't mistaken.

Q. Was that about the time you hired him or shortly after?

A. In a few days after the boy went to work.

Q. And the boy was injured October 1st?

A. October 1st, 1925.

Q. Did he see the boy working?

A. Yes, he seen him working?

Q. What did he say to you about it, if anything?

A. We were laying rail just west of Bays branch——

(Defendant objected, the court over-ruled the objection, to which defendant excepted.)

Frank Vanhoose had an extra force and helping me lay the steel. Mr. Verder come up there on 36 and come down where we were laying rail and Tobe come along with a bucket of water. He said something to the boy, and Mr. Verder says "Whose boy is that?" I says "He is my boy." He sayd "Are you working him?" I says "Yes sir, I am, Mr. Verder. I have got a big family, and looks like I am [fol. 69] pretty near bound to have some help." He said, "Alright, go ahead and work him."

Q. You say he was over you, Mr. Verdier?

A. Yes sir. He hired me, but he didn't fire me.

Q. Was other men working for the Chesapeake and Ohio Railway Company over Mr. Verdier that could *fire* you and fire Mr. Virdier?

Q. Yes, sir; but he was my boss at the time.

Q. How old was your son at the time he was injured?

A. He was fifteen years old on the 20th day of September and got hurt the first day of October.

Q. You mean he was fifteen years old and a few days over?

A. Yes sir; just turning into fifteen.

Q. About ten or eleven days over 15?

A. Yes.

Q. Did you go to the boy when he was hurt?

A. Yes sir. I didn't know who was hurt. I heard somebody hollow down there. I went to the boy.

Q. What was his condition?

A. He was laying over on the north side of the passing track, on the river side, laying there stretched out and his right hand was all hanging in strings here where the wheels run over it, and those other boys beat me to him. I heard him say "Come to me." His leg was broken up and mashed up.

Q. What did you do with the boy?

[fol. 70] A. We got him on 37 and took him to the hospital.

Q. Did the railroad company do that?

A. Well, yes, we got the train to stop and pick him up. Mr. Gibbs the trainmaster was on there.

Q. How long did the boy remain in the hospital?

A. I believe he was there about forty-two days, somewhere along there.

Q. Mr. Stapleton, what work has this boy been able to do since he was injured?

A. He ain't been able to do much. He can work a little. Shovel a little bit, has to run his arm under the shovel that way (indicating). He has been over in the mines at Blue Beaver. I have got a back hand hired and took the boy in there. We have got a hill to shove the cars up and he tries to help us shove the cars up the hill and gin around all he could.

Q. Heling you shove the mine cars up?

A. Helps me out because it is hard to shove the cars up.

Q. Has he been paid anything for that work.

A. I get it all. We ain't got anything at all turned in for him.

Q. Is he able to go out and get employment?

A. I don't think he is.

Q. Only got one hand to work with?

[fol. 71] A. Yes. Got one hand and thumb.

Q. Mr. Stapelton, after your boy was injured, did you make a report of his injury to the defendant railway company?

A. I made Mr. McAtee the claim agent a statement about how the boy got hurt.

Q. Did you also make report of the injury at the time he was hurt?

A. Yes sir; I made two.

Q. Who did you make it to?

A. Well, I sent a message. I didn't write it at the time I was supposed to. I didn't get it off on account of having to go to Paintsville and I had to fill out and let the operator fill out the report and send it by wire. I didn't get to do that until I believe it was next day after the boy was hurt. Then I made off a personal injury report and sent it to my supervisor, Mr. Johnson—No, Mr. Verdier was supervisor at that time.

Q. Did you report to the railway company the age of your son at the time?

A. Yes sir.

Q. I will ask you to state whether or not it is a fact that [fol. 72] the employees of the company insisted that you change that report?

(Objected to, withdrawn.)

Q. What employees did you make the report to?

A. It was just a report filled out. I sent it to the supervisor. I have to make nine copies of these reports.

Q. Do you know whether or not the railroad company still have the report that you made?

A. I suppose they have. I sent these reports to the supervisor.

Q. Who was it now you reported to, what was his name?

A. I had to fill out these reports and I sent them to the supervisor.

Q. I asked you who was the supervisor you sent them to?

A. Mr. Verdier.

Q. He was the man that had seen the boy working?

A. Yes.

Q. You made report to him?

A. I sent the report to him by mail.

Q. Did you have a conversation with Mr. Harris, who is the superintendent of the railroad company, Big Sandy division, in regard to this case?

A. No, I didn't have any conversation. He sent a message and asked me if it wasn't a mistake about the boy's age, if he wasn't over fifteen.

[fol. 73] Q. Did you wire him back?

(Defendant objected, the court overruled the objection, to which defendant excepted.)

A. I just wires him back that that was his age.

Q. Previous to the time he was injured and his hands cut off and his leg broken, state what kind of boy he was with respect to being able to work and physically able to perform labor?

A. Well, sir, he was a strong, healthy boy. Stout boy. Never was sick any in his life.

Cross-examination by Mr. Kirk:

Q. You say that after you made the report, Mr. Harris wires you to know if you was mistaken about the age of the boy?

A. He said, I believe he said wasn't there an error or mistake in that report, ain't the boy over fifteen years old?

Q. Error or mistake?

A. Yes.

Q. What did you do, wire him back?

A. I wired him back I had no lies to tell him, that that was exactly the boy's age.

Q. You knew it was against the rules of the company to employ a boy of that age?

A. In a way I did. They put out them instructions.

[fol. 74] Q. You had received written instructions, hadn't you, Mr. Stapleton, from the railroad company not to employ boys under sixteen, hadn't you?

A. I don't know whether I got that or not. I got one afterwards.

Q. You had got it before, too, hadn't you?

A. I wouldn't say pos-tive I did or didn't.

Q. You knew it was against the rules of the company?

A. I knowed in a way it was, yes sir.

Q. Notwithstanding that fact you took your boy out of school when he was under fifteen and employed him as a section hand for this railroad company?

A. Yes, I let the boy work some.

Q. He worked all the time you stated to the jury here?

A. Yes sir. He worked all that time, about nine months.

Q. *How* at the time you employed th- boy, you didn't tell the railroad company what his age was, did you?

A. No, sir; I didn't.

Q. They didn't know anything about that, did they?

A. I don't suppose the company knowe- anything about it.

Q. This boy you say performed the same kind of work as the other men except when he was carrying water?

A. Yes sir; he did other work when he was not carrying water.

Q. There is a great many freight trains moving along [fol. 75] over your section, is there not?

A. Yes, trains run up there pretty regular.

Q. Your boy was familiar with the movement of these freight trains?

A. He knowed they were there.

Q. He knew they would pull up on this side track and passing track and — subject to move out any minute?

A. Sure.

Q. You didn't know he had gone after water while that train was there?

A. No, sir.

Q. You didn't know he was there until he was injured?

A. I knowed he was on the job all right.

Q. You didn't know where he was at?

A. No, I hadn't paid any attention. The men were at work and I hadn't paid any attention.

Q. Your boy is a young man of ordinary intelligence, isn't he, Mr. Stapleton?

A. Yes, I think so.

Q. And he was a good sized boy at that time for his age?

A. Yes, sir; he was a good sized boy at the time.

Q. He could practically do a man's work?

A. He could do a right smart work, yes.

[fol. 76] Q. You thought he would have performed the same services or you wouldn't have hired him and paid him the same wages?

A. It generally takes one man to carry water and I knowed he could do that as good as anybody.

Q. You hired him for that purpose and to do other work when he was not carrying water?

A. Certainly did.

Q. The railroad company had him on their payroll?

A. Certainly.

Q. They sent him the pay by the pay check?

A. Yes, the same as everybody else got theirs.

Q. Did you turn that money over to him?

A. I got some of it, and he used some of it himself.

Q. You got most of it?

A. I expect I did. I guess we used it.

Q. At the time you put this boy at work around these freight trains and on this railroad, did you caution him about being careful?

A. I cautioned all my men to be careful.

Q. And the boy he knew the danger of these trains, didn't he?

A. He ought to.

Q. You frequently warned him not to pass under or over standing or moving trains, didn't you?

[fol. 77] A. I think I had told him not to climb over trains nor go under trains.

Q. You didn't know at this time or at the time he was injured that he was trying to get under this train?

A. No, sir.

Q. You had told him frequently before this time, that in crawling under a freight train it might suddenly move and injure him?

A. I don' know whether I told him exactly those words or not. I told him to be careful around trains.

Q. Didn't you say now, Mr. Stapleton, that you had warned him to be careful about crawling under freight trains, that they might suddenly move and injure him?

A. I expect I did.

Q. That is your best judgment, isn't it?

A. Yes.

Redirect examination by Mr. James:

Q. Mr. Stapleton, you didn't warn the boy not to go between the cars of a train sitting on the side track and not moving, but sitting still, did you?

(Defendant objected, the court over-ruled the objection, to which defendant excepted.)

A. Well, I just told him to be careful around trains.

Q. You told all of your employees to be careful?

[fol. 78] A. I had cautioned all my men——

Q. You just told all your men to be careful about moving trains?

A. I told the boy to be very careful about trains. I ain't going to tell any lie about it. It was my duty to do that.

Q. It was your duty to tell all your men to be careful?

A. Certainly it was my duty. It was one of the most important duties I have, is to be careful.

Q. You was an agent for the railroad company at the time this injury happened, wasn't you?

A. Yes.

Q. Same as the other men?

(Defendant objected, the court sustained the objection, to which plaintiff excepted.)

By the Court: He was section foreman, but he was not agent.

Mr. James: He was superior in authority to this boy. We except to the ruling of the court.

Thereupon the plaintiff introduced the witness HERBERT BALDRIDGE, who, being first duly sworn, testified as follows, to-wit:

Q. Where do you live, Mr. Baldridge?

[fol. 79] A. On Little Paint.

Q. I believe you are working now for the railway company?

A. Yes.

Q. What kind of work are you doing?

A. Just track work.

Q. Section hand?

A. Yes.

Q. How long have you been working for the company?

A. About ten years.

Q. Were you working for the Chesapeake & Ohio Railway Company at the time the Stapleton boy was injured, got his hand cut off?

A. Yes.

Q. Did you see the boy after he was injured?

A. Yes, I was the first one that got to him, one man got to him just a few steps before I did, but about that time I got to him.

Q. Did you know about the boy going out to get water?

A. No, sir. I didn't pay any attention, but he was at the tool house at work time, but I didn't know when he left.

Q. You didn't pay any attention when the boy left to go after water?

A. No.

[fol. 80] Q. When you got to him, what condition did you find the boy in?

A. He was laying kindly flat down on the ground, something like fifty or seventy five feet from where he got hurt. We heard somebody hollow, and I just went over to the train to see where he was hurt, and where the blood was on the rail. He must have been fifty or seventy five feet from the train.

Q. You went over to the train—the same train that had hurt him?

A. Yes.

Q. Did you notice any blood around there?

A. Yes, Blood and flesh was there on the rail and there was where the water bucket turned over between the track and had rolled from a piece down below from where he was.

Q. How many of you men climbed over the train?

A. I didn't pay any attention. Me and Sam George.

Q. Was the train stopped at that time?

A. Yes, setting still.

Q. What condition did you find his hand in?

A. All mashed up, pieces off of his hand, all along chewed up kindly.

Q. That was on the side track below the depot here?

A. Yes.

Q. The train side-tracked there for the passengers to [fol. 81] pass, did it?

A. Yes.

Q. You say you have been working for the company about ten years?

A. Yes, I think ten years about the 13th of July, but I commenced in 1917, in July, about the 13th, I think.

Q. Do you know Mr. Berder the track supervisor at that time?

A. Yes.

Q. Were your ever present on any occasion and heard a discussion between Mr. Verder, the track supervisor and Mr. Stapleton here, in regard to working his boy?

(Defendant objected, the court over-ruled the objection, to which defendant excepted.)

A. The most ever I heard I was just passing there—I never heard Mr. Verder ask any questions. I heard the old man say "my boy—" I was in a rush going after a hammer to the tool box that was in above me west of the Bays branch.

Q. You did hear him say something about the boy working?

(Defendant objected, the court over-ruled the objection, to which defendant excepted.)

A. Yes.

Q. What did he say about the boy working?

A. I went on. I didn't hear the conversation. I was [fol. 82] in a rush. They sent me after a hammer.

Q. What did Mr. Stapleton say to him?

A. He said "It is my boy."

Cross-examination by Mr. Kirk:

Q. Mr. Baldridge, about how far down the river was you working at the time this injury occured below the depot?

A. I never did notice right particular, but it must have been anyway between ten or fifteen telephone poles lengths below the depot. I an't sure but it is yon side of the toolhouse.

Q. You mean telephone spaces?

A. Yes, between the telephone poles.

Q. How much space is between telephone poles?

A. Must be one hundred and twenty five feet or more.

Q. Then it was twelve or thirteen hundred feet below the depot?

A. Away down below the depot. Below the toolhouse.

Q. Mr. Baldridge, how many tracks is there there where this injury occurred?

A. Two Passing track and main line.

A. A good many freight trains use this track in passing there?

A. Yes.

[fol. 83] Q. This boy had been working about how long in your judgment?

A. I never did know.

Q. He worked considerable time with the company, before he was injured?

A. Yes,

Q. He was familiar with the movement of the trains?

A. Yes, I suppose so.

Q. He was around a good deal and knew about the section where you were working?

A. Yes.

Q. Knew about how they stopped and started, and so forth?

A. Yes.

Q. He was a boy of fairly good intelligence at that time?

A. Yes.

Q. A good sized boy to his age, wasn't he?

A. His age showed him to be really older than he was. I can't tell much difference in him from his appearance. I couldn't tell much about his age. I can't tell any difference in the looks of him now. His age don't show any older than when I went to work. I was not acquainted much with him. They had just moved here.

[fol. 84] Q. None of the section men knew about his injury until you heard him hollow?

A. No, sir; just heard him hollow and went to him.

Redirect examination by Mr. James:

Q. At the time you heard this conversation between Mr. Stapleton and Mr. Verder was the boy standing there by working?

A. I don't remember.

Q. He was working?

A. Yes, he was working, but I don't remember who was standing there.

Stenographer's certificate to foregoing omitted in printing.

[File endorsement omitted.]

[fols. 85 & 86] Statement of costs omitted in printing.

[fol. 87] In Court of Appeals of Kentucky

The Chesapeake and Ohio Railway Company, Appellant,

against

Tobe Stapleton, by Marion Stapleton, His Statutory Guardian, Appellee

Statement on Appeal.

Comes the appellant, The Chesapeake and Ohio Railway Company, and files this, its statement on appeal, pursuant to the requirements of Section 739 of the Civil Code.

A. Appellant, The Chesapeake and Ohio Railway Company.

B. Appellee, Tobe Stapleton, by Marion Stapleton, his Statutory Guardian.

C. The judgment appealed from was rendered at the February Term, 1927, of the Floyd Circuit Court, upon the 18th day of February, 1927, and may be found on pages 27 and 28 of the Record.

D. No summons need be issued.

E. Attorneys for appellee are P. M. James and Joe Hobson, Prestonsburg, Kentucky.

Browning & Reed, Combs & Combs, Kirk, Kirk & Wells, Counsel for Appellant.

[fol. 88] In Court of Appeals of Kentucky

Judgment—February 14, 1928

The Court being sufficiently advised it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent damages on the amount of the judgment superseded herein, which is ordered to be certified to the said Court.

It is further considered that the appellee recover of the appellant his costs herein expended.

[fol. 89] IN COURT OF APPEALS OF KENTUCKY

THE CHESAPEAKE & OHIO RAILWAY CO., Appellant

vs.

TOBE STAPLETON'S GUARDIAN, Appellee

Appeal from the Floyd Circuit Court

OPINION OF THE COURT BY JUDGE LOGAN, AFFIRMING—February 14, 1928

The appellee, Tobe Stapleton, while endeavoring to crawl under one of appellant's freight trains was run over sustaining injuries which consisted of broken leg and the loss of four fingers on his right hand. At the time of the accident he was employed by appellant as a section laborer, and he had been so employed for about nine months. When he was not engaged in carrying water to the other section hands he worked with them on the track. It was a part of [fol. 90] his duties to carry water from a spring located across the track of appellant, and as appellee went to and returned from the spring he necessarily crossed the tracks. On the date of his injury, October 1, 1925, he had gone to the spring after a bucket of water. A freight train had pulled in on a side track and stopped, thus blocking his path. Assuming that the freight train would remain on the side track until a passenger train had gone by appellee attempted to crawl under the freight train with his bucket of water. Neither the train crew nor any other member of the section gang appeared to have known of his attempt to crawl under the train until the accident occurred. While he was under he train the engineer moved the train and caught appellee inflicting upon him the injuries complained of. His right hand was cut off from his wrist diagonally cross the hand leaving only the thumb. His right leg was broken and crushed. He was confined in a hospital for about six weeks. He testified that his right arm is perishing and that his right leg is crooked and enlarged.

At the time of his injury Stapleton was fifteen years of age. Suit was instituted by appellee's guardian to recover damages for these injuries, the action being brought under the Federal Employees Liability Act. It is conceded that

both appellee and appellant were, at the time of the accident, engaged in interstate commerce. The petition alleged [fol. 91] two specific acts of negligence. First, the negligence of the train crew in moving or backing the train which injured appellee, and second, the employment of appellee by appellant in violation of section 331a-9 Ky. Stats. A trial resulted in a verdict in favor of appellee for $17,500.00.

The crucial question in this case is whether appellee was entitled to recover in this action because of his employment by appellant in violation of the aforesaid section of the Ky. Stats. It is argued by counsel for appellant that in actions under the Federal Statute the right of recovery is dependent upon the principles of the common law as interpreted by the Federal courts, and that the right of action created by the statute can neither be broadened nor limited by any state statute. It is admitted by counsel for appellant that if appellee was employed in violation of the aforesaid section of the statute that he could recover in an action under the state or common law for an injury sustained in the course of such employment. It was so held in the case of Louisville, Henderson & St. Louis Railway Co. v. Lyons, 155 Ky., 396, 159 S. W., 371; Sanitary Laundry Company v. Adams, 183 Ky., 39, 208 S. W., 6; Clark v. Wells-Elkhorn Coal Company, 215 Ky., 128, 284 S. W., 91. It is suggested in the brief for appellant that the controlling and exclusive nature of the Federal Statute has been recognized and stated by this court in a number of cases among the number being Davis, Agent, etc., v. Dye, 215 Ky., 216, 284 S. W., 1094; [fol. 92] South Covington & Cincinnati Street Railway Company v. Finan's Admx., 153 Ky., 340, 115 S. W., 742; Illinois Central Railroad Company v. Doherty's Admr., 153 Ky.; 363; 155 S. W., 1119; L. & N. R. R. Co. v. Strange's Admx., 156 Ky., 439, 161 S. W., 239; McGarvey's Guardian v. McGarvey's Admr., 163 Ky., 242, 173 S. W., 765 and Cincinnati & T. P. Ry. Co. v. Clarke, 169 Ky., 662, 185 S. W., 94.

In the case of Davis Agent v. Dye, supra the only question considered was that of limitation. The court held that the suit could not be maintained at all against the government without its consent and that when it gave its consent to be sued it had the right to attach such conditions thereto

as it desired. The Federal Statute in effect was held to be in conflict with the Kentucky Statute relied on.

In the case of Covington & Cincinnati Street Railway Company v. Finan's Admx., supra, it was held by this court that the Employers Liability Act was to supersede the state laws on the same subjects. That is true but the Employers Liability Act does not undertake to defiine negligence, and, therefore, there appears no reason for holding that it supersedes section 331a-9 Ky. Stats. In the case of Illinois Central Railway Company v. Doherty's Admr., supra, it was held that the Employers Liability Act supersedes all state laws upon the same subject. That act makes a railroad company liable in damages for "injury or death resulting in whole or in part from the negligence of any of [fol. 93] the officers, agents or employees of such common carrier." That is the only provision of the act relating to negligence and that provision would not supersede any law of a state difining negligence. In the case of L. & N. R. R. Co. v. Strange's Admrs., supra, the court stated the points of dissimilarity between the rights of a party in a suit under the state law and in a suit under the Federal Statute. In the case of McGarvey's Guardian v. McGarvey's Admr., supra, this court held that the recovery in that case was controlled by the Federal Act because under the state of case mentioned the Federal Act controlled to the exclusion of all state regulation. In the case of C. N. O. & T. P. Ry. Co. v. Clarke, supra, this court held that the Federal Act supersedes the common law of the state when relief may be properly had under the Federal Act.

Taking all of these cases cited and relied on by counsel for appellant we do not find that they support the contention of appellant either individually or collectively. In the case of Seaboard A. L. R. Co., v. Horton, 233 U. S., 482, 58 L. Ed., 1062, the Supreme Court appears to have gone no further than to hold that the state law is superseded by the Federal law where the Federal law is in conflict with the state statute. There can be no doubt that the Federal Act is supreme, and where there is a conflict between the Federal Act and the statute of the state, in the state statute is superseded by the Federal Act.

In the case of C. N. O. & T. P. Ry. Co. v. Swann's Admx., 160 Ky., 458, 169 S. W., 886, this court said:

[fol. 94] "It will be noticed that the Federal act under which this action was brought does not undertake to define the character or degree of negligence necessary to a recovery. This being so, we think that when an action is brought under the Federal act in our State courts to recover damages for injuries suffered on account of the negligence of another employe the rules of law prevailing in this State must be looked to in determining whether the acts or omissions complained of amount to negligence. There is no difference in cases like this in the character or degree of negligence necessary to sustain a verdict and judgment, whether the action be brought under the Federal or State law. The negligence that would authorize a recovery, under one would authorize it under the other."

The opinion in that case on this point appears to us to be a sound interpretation of the law, and unless the United States Supreme Court has placed a different construction on the Federal Act, we see no reason to depart from the principles announced in the quotation above.

It is insisted, however, that the Supreme Court has placed a different construction on the Federal Act, but an examination of the authorities cited and relied on by appellant does not convince us that the contention of appellant is sound. [fol. 95] On the other hand the rule contended for by counsel for appellee was fully sustained in the case of Frese v. Chicago Burlington & Quincy Ry. Co., 263 U. S., 1, 68 L. Ed., 131. In that case it appeared that an engineer was injured in a collision and sued this railroad company under the Federal Act to recover. The accident occurred in Illinois which state had a statute then in force providing that,

"All trains running on any railroad in this state when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge in use as such, shall be brought to a full stop before reaching the same and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is

cleared." The engineer was denied a recovery on the ground that he did not ascertain that the way was clear before entering upon the crossing. In discussing the question the Supreme Court said:

"Moreover the statute makes it the imperative duty of the engineer to pos-tively ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty and it would be a perversion of the Federal Employers Act to hold that he could [fol. 96] recover for an njury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

In conclusion the opinion of that case the court said:

"There is no doubt that the statute of Illinois applied to this case."

The violation of section 331a-9 is negligence. The Federal Employers Liability Act makes a railroad company liable for negligence. That section of the Ky Stats. is not superseded by the Federal Act. Whether the railroad company is guilty of negligence depends upon the law of the state where the injury happened unless the law of the state is in conflict with the Federal Act.

It is insisted by counsel for appellant that appellee is not entitled to recover for the reason that when he was injured he was making an improper, unnecessary and unauthorized use of the master's premises. It is true his duties did not require him to crawl under or through the standing train, but he was attempting to discharge his duties when he did so. He was not a volunteer or acting outside the scope of his employment. He would not have attempted to crawl under the train in carrying water to the section hands if he had not been employed by appellant in violation of the statute. It was said by this court in the case of Louisville, Henderson & St. Louis Railway v. Lyons, [fol. 97] supra,

"The lives or limbs of children are too valuable to be sacrificed in dangerous employments, and if an employer, in violation of the statute, engages the services of a child in such an employment, he must see to it that no harm comes

to him, or if it does, he must compensate him, in so far as money can do, for the injury inflicted."

It is said in brief for appellant that its motion for a peremptory instruction should have been sustained because the action is based on the Federal Employers Liability Act, and that appellee was not entitled to recover because of the violation of section 331a-9 Ky. Stats. We disagree with counsel on that point. It is also said that a peremptory instruction should have been given because aside from the alleged violation of the state statute the evidence fails to disclose any negligence which contributed to or caused the accident complained of. The violation of the statute was sufficient and it was unnecessary to establish any other negligence which contributed to or caused the accident complained of.

Complaint is made about the instructions given by the court. It is suggested that instruction No. 3 given by the court is equivalent to a peremptory instruction to find for the plaintiff. That is true and it is as it should be. The only objection to the instruction is that it should have sub- [fol. 98] mitted to the jury the question as to whether or not appellee was employed in work of the character prohibited by the statute. If any such instruction was asked for by appellant we do not find it in the record. The court appears to have given every instruction asked for by appellant.

The last alleged error complained of is that the verdict is excessive, and that it is out of proportion to the injuries sustained. Appellee lost his right hand except the thumb. His leg was broken and he spent six weeks in a hospital. There is some evidence that his right arm is perishing away and that his leg is swollen and enlarged. As was said in the case of C. & O. Ry Company v. Honaker, 190 Ky., 125, 226 S. W., 294:

"In the very nature of things the amount which will compensate a person for personal injury, especially where it is permanent, cannot be measured by strict and definite rules and must be left largely to the sound judgment of the jury. Hence, it is our rule not to disturb its finding unless the amount is so disproportionate to the injury as to strike us at first blush as being the result of prejudice or passion.

In recent years this court has been inclined to approve larger verdicts because of the increase in the cost of living and the decrease in the purchasing power of a dollar."

[fols. 99 & 100] In that case a verdict for $15,000.00 for the loss of a foot was upheld. The loss of a hand is a more serious impairment of the power to earn money than the loss of a foot.

In the case of C. & O. Ry. Company v. Dickson, 218 Ky., 84, 290 S. W., 1064, this court upheld the verdict of $20,000.00 for the loss of a leg below the knee. The element of physical and mental suffering, entered those cases as it does into this.

Judgment affirmed.

Browning & Reed, Ashland, Ky.; Combs & Combs, Prestonsburg, Ky.; Kirk, Kirk & Wells, Paintsville, Ky., for appellant.

B. M. James, Prestonsburg, Ky.; Joe Hobson, Prestonsburg, Ky., for appellee.

[fol. 101] In Court of Appeals of Kentucky

[Title omitted]

Notice of Motion for Stay of Mandate—Filed March 1, 1928

The appellee is hereby notified that the appellant will, on the first day of March, 1928, apply to the Court of Appeals of Kentuckey, or to the Chief Justice, of said Court, for a stay of the mandate herein, pending the application of appellant for writ of certiorari to the Supreme Court of the United States.

Kirk, Kirk & Wells, Browning & Reed, Counsel for appellant.

Service of the above notice accepted this 25th day of February, 1928.

B. M. James, Counsel for Appellee.

[File endorsement omitted.]

[fols. 102 & 103] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

MOTION FOR STAY OF MANDATE—Filed March 1, 1928

Comes the appellant, The Chesapeake and Ohio Railway Company, and moves the court for stay of mandate herein, pending the application by appellant for a writ of certiorari herein, to the Supreme Court of the United States.

Browning & Reed, Counsel for Appellant.

[File endorsement omitted.]

[fol. 104] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER STAYING MANDATE

On motion of appellant, it is ordered that the issuance of mandate herein be stayed, pending the application of appellant for writ of certiorari herein to the Supreme Court of the United States, and until the petition for said writ of certiorari is passed upon.

[fol. 105] Certificate of W. B. O'Connell, Clerk of Court of Appeals of Kentucky, to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1928

The petition herein for a writ of certiorari to the Court of Appeals of the State of Kentucky is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3782)

FILED
MAY 8 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. [redacted] 133

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LE WRIGHT BROWNING,
Attorney for Petitioner.

BROWNING & REED,
Of Counsel.

(33,435)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of The Chesapeake & Ohio Railway Company shows to this Honorable Court as follows:

The respondent, Tobe Stapleton, by his father and statutory guardian, seeks in this action to recover damages against The Chesapeake & Ohio Railway Company for personal injuries. The action was insti-

tuted in the Circuit Court of Floyd County, Kentucky. Upon the trial of the cause a verdict in favor of the respondent was returned in the sum of $17,500, and judgment was rendered in accordance therewith (R., 13). Upon appeal to the Court of Appeals of Kentucky, the judgment of the circuit court was affirmed, the opinion (R., 47, *et seq.*) having been delivered on the 14th day of February, 1928, and reported in 223 *Ky.*, 154; 3 *S. W.* (*2d*), 209 (advance sheets). The action was brought under and pursuant to the provisions of the Federal Employers' Liability Act (45 *U. S. C. A., Secs.* 51-59 (*U. S. Comp. Stat., Secs.* 8657-8665)). The specific act of negligence upon which a recovery was had in the circuit court and an affirmance secured in the court of appeals was an alleged violation of a certain statutory provision of Kentucky, known as the Child Labor Law, which prohibits the employment of infants under 16 years of age in certain occupations and trades (*Sec.* 331*a*, *subsec.* 9, *Ky. Statutes*), which statutory provision is set out in full as an appendix hereto.

Statement of Facts.

The facts of the case are simple and undisputed. While endeavoring to crawl under one of petitioner's freight trains, the respondent was run over and sustained injuries which consisted of a broken leg and the loss of four fingers on his right hand. At the time of the accident he was employed by petitioner as a section laborer, and had been so employed for several months prior to the accident. His chief duty was to

carry water for the other section hands, and when not so engaged he worked with them on the track. On the day of his injury, October 1, 1925, respondent was returning to the scene of the section crew's labors with a bucket of water from a nearby spring, and while attempting to crawl under a standing freight train was injured as above stated by the starting of the train. Neither the train crew nor any other member of the section crew knew of his attempt to crawl under the train until the accident occurred.

At the time of the accident the respondent was 15 years of age, and it is conceded that his employment was in violation of the Child Labor Law of the State of Kentucky (*Section* 331*a*-9, *Ky. Stats.*), which provides that "no child under the age of 16 years shall be employed, permitted or suffered to work upon any railroad, whether steam, electric or hydraulic, nor to work in any other occupation dangerous to the life or limb or injurious to the health or morals of such child," the full text of the aforesaid act being set out in the Appendix hereto.

Questions of Law to be Reviewed.

The respondent's cause of action is based upon the Federal Employers' Liability Act (45 *U. S. C. A., Secs.* 51-59; (*U. S. Comp. Stat., Secs.* 8657-8669), it being expressly alleged and admitted that at the time of the accident both the petitioner and the respondent were engaged in interstate commerce.

While other acts of negligence were alleged in the petition (R., 1-4), the sole ground upon which

a recovery was had in the trial court was the alleged employment of respondent in violation of the provisions of the Kentucky statute, and the judgment of the lower court was affirmed by the Kentucky Court of Appeals upon the express holding that a recovery upon this ground was authorized. It was not alleged or proven that the employment of respondent was negligent independent of the statute. However, under the Kentucky decisions, the employment of an infant in violation of the statute is negligence *per se*.

Louisville, H. & St. L. Ry. Co. v. Lyons, 155 Ky., 396; 159 S. W., 971.

Sanitary Laundry Co. v. Adams, 183 Ky., 39; 208 S. W., 6.

Clark v. Wells Elkhorn Coal Co., 215 Ky., 128; 284 S. W., 91.

In sustaining respondent's right of recovery because of the violation of the State statute, the Kentucky Court of Appeals expressly did so upon the ground that in suits under the Federal act the question as to what constitutes negligence within the meaning of that act "depends upon the law of the State where the injury happened unless the law of the State is in conflict with the Federal act."

The precise question of law presented for determination, therefore, is,

In a suit under the Federal Employers' Liability Act, may a recovery be had upon allegation and proof of a violation by the defendant of a State statute?

The broad question presented for decision is:

In actions under the Federal statute, is the existence or non-existence of negligence to be determined by State statutes and State rules of decision, or by the rules of the common law as construed and applied by the Federal courts?

Your petitioner respectfully contends that since the respondent's right of action arose under and depended upon the provisions of the Federal act, there could be no recovery herein upon allegation and proof of the violation of a State statute, and since that was the sole ground upon which a recovery was sought or had. that the Circuit Court of Floyd County, Kentucky, erred in overruling your petitioner's motion to peremptorily instruct the jury to find for it, and the Court of Appeals of Kentucky erred in affirming the judgment of the circuit court.

Seaboard A. L. R. Co. v. Horton, 233 U. S., 492.
New York Cent. R. Co. v. Winfield, 244 U. S., 147.
Erie R. Co. v. Winfield, 244 U. S., 170.
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New Orleans, etc., R. Co. v. Harris, 247 U. S., 367.
Toledo, etc., R. Co. v. Slavin, 236 U. S., 367.

Your petitioner further respectfully contends that the Court of Appeals of Kentucky erred in holding and deciding that, in actions under the Federal statute, the existence or non-existence of negligence depends upon the law of the State where the accident occurred,

and that such ruling is in conflict with the decisions of this Honorable Court.

Chicago, etc., R. Co. v. Coogan, 271 U. S., 472.
Southern Ry. Co. v. Gray, 241 U. S., 333.
Cent. Vermont R. Co. v. White, 238 U. S., 507.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of the State of Kentucky, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court of appeals in this cause, which was entitled in that court: "*The Chesapeake and Ohio Railway Company, appellant, v. Tobe Stapleton, by his statutory guardian, Marion Stapleton, appellee,*" to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the judgment of the said Court of Appeals of Kentucky may be reversed by this Honorable Court.

THE CHESAPEAKE AND OHIO RAILWAY CO.,
Petitioner,
By LE WRIGHT BROWNING,
Its Attorney.

BROWNING & REED,
Of Counsel.

STATE OF KENTUCKY,
County of Boyd, ss:

Affiant, Le Wright Browning, being duly sworn, states that he is one of counsel for The Chesapeake and Ohio Railway Company, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

LE WRIGHT BROWNING.

Subscribed and sworn to before me by Le Wright Browning this 19th day of April, 1928.

[SEAL.] EDNA LEONARD,
Notary Public, Boyd County, Kentucky.

My commission expires June 11, 1928.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

LE WRIGHT BROWNING.

APPENDIX.

Section 331a-9, Kentucky Statutes: No child under the age of sixteen years shall be employed, permitted to, suffered (1) to sew or assist in sewing belts in any capacity whatever; (2) nor to adjust any belt to any machinery; (3) nor to oil, wipe, or clean machinery; (4) nor to operate or assist in operating any of the following-named machines: (*a*) circular or band saws; (*b*) wood shapers; (*c*) wood joiners; (*d*) planers; (*e*) sandpaper or wood polishing machinery; (*f*) emery or polishing wheels used for polishing sheet metals; (*g*) wood turning or boring machinery; (*h*) picker machines or machines used in picking wool, cotton, hair or other materials; (*i*) carding machines; (*j*) paper-lace machines; (*k*) leather burnishing machines; (*l*) job or cylinder printing presses operated by other power than foot power; (*m*) boring or drill presses; (*n*) stamping machines used in sheet metal and tinware or in paper and leather manufacturing, or in washer and nut factories; (*o*) metal or paper cutting machines; (*p*) corner staying machines in paper box factories; (*q*) corrugating rolls such as are used in corrugated paper, roofing or washboard factories; (*r*) steam boiler, steam machinery or other steam generating apparatus; (*s*) dough brakes or cracker machinery of any description; (*u*) rolling mill machinery; (*v*) power punchers or shears; (*w*) washing, grinding or mixing machinery; (*x*) calendar rolls in paper and rubber manufacturing; or (*y*) laundering machinery; (5) nor work in proximity to any hazardous or unguarded belts, machinery or gearing; (6) nor to work upon any railroad, whether steam, electric or hydraulic; (7) nor to operate or assist in operating any passenger or freight elevator; (8) nor to work in any capacity in processes in which dangerous or poisonous acids are

used; (9) nor to work in any capacity in the manufacture or packing of paints, colors of white or red lead; (10) nor to work at soldering; (11) nor to work in occupations causing dust in injurious quantities; (12) nor to work in the manufacture or use of dangerous or poisonous dyes; (13) nor to work in the manufacture or preparation of compositions with dangerous or poisonous gases; (14) nor to work in the manufacture or use of compositions of lye in which the quantity thereof is injurious to health; (15) nor to work in any tunnel or excavation; (16) nor to work on scaffolding; (17) nor to work in any capacity in, about, or in connection with any mine, coke oven or quarry; (18) nor to work in assorting, manufacturing or packing tobacco; (19) nor to operate any automobile, motor car or truck; (20) nor to work in any bowling alley; (21) nor to work in any pool or billiard room; (22) nor to work in any distillery, brewery, or other establishment where malt or alcoholic liquors are manufactured, packed, wrapped or bottled; (23) nor to work in any hotel, theater, concert hall, club, place of amusement, or any other establishment where intoxicating liquors are sold; (24) nor to work in any other occupation dangerous to the life or limb or injurious to the health or morals of such child, and as to these matters the decision of the county physician or city health officer, as the case may be, shall be final.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The respondent's cause of action is based upon the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) it being alleged (R., 1, 2, 3) and admitted that the petitioner was engaged, and the respondent employed, in interstate commerce at the time of the accident. The uncontradicted proof as to the nature of the work being performed by respondent sustained the allegation as to the application of the Federal statute. (See *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146; 33 Sup. Ct., 648; 58 L. Ed., 1125; *Philadel-*

phia, B. & W. R. Co. v. Smith, 250 U. S., 101; 39 Sup. Ct., 396; 63 L. Ed., 869.)

Consequently the question presented is as to whether or not, in an action under the Federal statute, there can be a recovery based upon an alleged violation by the defendant of a State statute.

It is respectfully submitted that the rule is established by repeated decisions of this Court that in actions under the Federal statute the right of recovery is dependent upon the principles of the common law as interpreted by the Federal courts, and that the right of action created by the statute can neither be broadened nor limited by any State statute or rule of decision.

Specific instances of the application of this principle are to be found in *Seaboard A. L. R. Co. v. Horton*, 233 U. S., 492; 34 Sup. Ct., 635; 58 L. Ed., 1062, wherein it was held that in an action under the Federal statute the plaintiff was not entitled to the benefit of certain statutory provisions of North Carolina which imposed upon the employer an absolute liability for defects in machinery and appliances and limited the common-law defense of assumed risks; in *New York Cent. R. Co. v. Winfield*, 244 U. S., 147; 37 Sup. Ct., 546; 61 L. Ed., 1045; *Erie R. Co. v. Winfield*, 244 U. S., 170; 37 Sup. Ct. 556; 61 L. Ed., 1057; *New York Cent. R. Co. v. Porter*, 249 U. S., 168; 39 Sup. Ct., 188, 63 L. Ed., 536; *Southern Pacific Co. v. Industrial Accident Com.*, 251 U. S., 259; 40 Sup. Ct., 130; 64 L. Ed., 258, wherein it was held that an employee injured in interstate commerce was not entitled to an award under a State com-

pensation act, even though, because of the absence of negligence he could not recover under the Federal Statute; in *New Orleans & N. E. R. Co. v. Harris*, 247 U. S., 367; 38 Sup. Ct., 535; 62 L. Ed., 1167, where a statute of Mississippi providing that proof of injury was *prima facie* evidence of negligence was held inapplicable to an action under the Federal statute; in *Toledo, St. Louis & W. R. Co. v. Slavin*, 236 U. S., 454; 35 Sup. Ct., 306; 59 L. Ed., 671, where it was held that a statute of Ohio abolishing the defense of assumed risks was without application in an action by an employee injured while engaged in interstate commerce.

The precise question here involved was before the supreme courts of Arkansas, Michigan and California in the cases of *St. Louis-San Francisco Ry. Co. v. Conly* (*Ark.*), 241 S. W., 365; *Petronek v. Minneapolis, etc., R. Co.* (*Mich.*), 216 N. W., 467, and *Smithson v. Atchison, T. & S. F. Ry. Co.* (*Cal.*), 162 Pac., 111, and in all three cases it was decided that in an action under the Federal statute a plaintiff could not rely upon a violation of a statute of the State as evidence or proof of negligence.

The erroneous conclusion reached herein is due to the insistence of the Kentucky court on following a rule laid down in an earlier decision (*Cincinnati, N. O. & T. P. Ry. Co. v. Swan*, 160 Ky., 458; 169 S. W., 886), to the effect that in suits under the Federal statute "the rules of law prevailing in this State must be looked to in determining whether or not the acts or omissions complained of amount to negligence." Such a declaration is in direct conflict with the ruling of

this Court that in actions "under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of the common law as interpreted and applied in the Federal courts." (See *Southern Ry. Co. v. Gray*, 241 U. S., 333; 36 Sup. Ct., 558; 60 L. Ed., 1030; *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S., 472; 46 Sup. Ct., 564; 70 L. Ed., 1041.) In the case at bar the Kentucky appellate court held that "whether the railroad company is guilty of negligence depends upon the law of the State where the injury happened, unless the law of the State is in conflict with the Federal act." It is submitted that such a declaration is erroneous in its entirety. The law of the State is without application, regardless of whether or not it is in conflict with the act, for the reason that by the act itself the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the State laws. (See *New York Cent. R. Co. v. Winfield, supra*, and authorities therein cited; *Erie R. Co. v. Winfield, supra.*) It might be noted that even under the holding of the Kentucky Court of Appeals the Kentucky statute would be without application, in that it makes negligence *per se* that which under the Federal act, standing alone, would not be negligence, to wit, the employment of one under sixteen years of age.

It is submitted that the case of *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S., 1; 44 Sup. Ct., 1; 68 L. Ed., 131, relied upon by the Kentucky court as supporting its conclusion herein, is not in point or in any way in conflict with the authorities hereinbefore cited. This

court was not there dealing with any attempt to broaden or add to the Federal act. The only question under consideration was whether or not the negligence of the plaintiff's intestate was the sole proximate cause of the accident. In determining this question the court referred to an Illinois statute which imposed upon railroad engineers certain duties for the protection of the traveling public. This statute did not attempt to regulate or affect the liability of railway companies to their employees, and the court in giving it effect did so just as it would have given effect to a rule or regulation of the railway company adopted to insure safe operation of its trains.

One of the obvious purposes of the Federal act is to insure uniformity of substantive law in every court and every State, and, as said in *Michigan Cent. R. Co. v. Vreeland*, 227 U. S., 59, 66, 67; 33 Sup. Ct., 192; 57 L. Ed., 417, "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury."

Since the only ground upon which a recovery was had herein was the alleged violation of the Kentucky statute, it is respectfully submitted that the petitioner's motion for a directed verdict should have been sustained, and that the Court of Appeals of Kentucky erred in refusing to so decide.

LE WRIGHT BROWNING,
Counsel for Petitioner.

BROWNING & REED,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1927

No. 133

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Petitioner*,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR PETITIONER.

LEWRIGHT BROWNING,
Counsel for Petitioner.

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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Petitioner*,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, *Respondent.*

ON WRIT OF CERTIORARI.

BRIEF FOR PETITIONER.

May it Please the Court:

This additional brief is filed on behalf of the petitioner for the purpose of extending what is contained in the original brief filed in support of the petition for a writ of certiorari.

A judgment was recovered herein by the respondent in the Circuit Court of Floyd County, Kentucky, for the sum of $17,500.00. Thereafter, that judgment was affirmed by the Court of Appeals of Kentucky *(223 Ky. 154, 3 S. W. (2d) 209)*. The action was brought under and pursuant to the provisions of

the Federal Employers Liability Act (45 U. S. C. A., Secs. 51-59). The sole ground upon which a recovery was had in the trial court, and an affirmance thereof obtained in the appellate court, was the employment of the respondent by the petitioner in violation of the provisions of Sec. 331a Kentucky Statutes (appended to the petition for writ of certiorari), which prohibits the employment in certain occupations and trades, of infants under the age of sixteen.

QUESTIONS OF LAW INVOLVED

The precise question of law presented for determination herein, is,

In a suit under the Federal Employers' Liability Act, may a recovery be had upon allegation and proof of a violation by the defendant of a state statute?

Or, to phrase the same question in broader language,

In actions under the Federal Statute, is an asserted right of recovery dependent upon state statutes and state rules of decision or upon the rules of the common law as construed and applied by the Federal Courts?

The Kentucky appellate court in affirming the judgment of the trial court, laid down the following rule as governing the determination of the question of liability under the Federal act *(223 Ky. 154, 3 S. W. 209; pp. 47-53, Record)*:

> "The violation of section 331a-9 is negligence. The Federal Employers' Liability Act makes a railroad company liable for neg-

ligence. That section of the Ky. Stats. is not superseded by the Federal Act. *Whether the railroad company is guilty of negligence depends upon the law of the state where the injury happened unless the law of the state is in conflict with the Federal Act.*"

In so holding the Kentucky court followed its previous holding in *Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Admx., 160 Ky. 458, 169 S. W. 886;* and *Helm v. Cincinnati, N. O. & T. P. Ry. Co., 156 Ky. 240, 160 S. W. 945;* a ruling which, it may be noted, is not in harmony with utterances of the same court in *Louisville & N. R. Co. v. Grant, 223 Ky. 39, 2 S. W. (2d) 1063*, and the earlier decisions referred to in the opinion rendered herein.

It is respectfully submitted that the conclusion reached herein by the Kentucky Court of Appeals is unsound and in direct conflict with what has been repeatedly decided by this court.

ARGUMENT

I

THE BASIS OF RECOVERY UNDER THE FEDERAL ACT

Liability under the act is dependent upon the existence of negligence. The mere fact that injury or death results to an employee will not of itself authorize a recovery. Unless the injury or death was caused by the negligence of the carrier master there can be no recovery therefor. In *Seaboard A. L. R.*

Co. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, this court, in discussing the primary question of liability under the act, said:

> "By its 1st section a right of action is conferred (under conditions specified) for injury or death of the employee 'resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'
>
> "This clause has two branches; the one covering the negligence of any of the officers, agents or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. Hough v. Texas & P. R. Co., 100 U. S. 213,

217, 25 L. ed. 612, 615; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230. To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated."

See also, *Southern Ry. Co. v. Gray, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030; New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167.*

II

MODE OF DETERMINING WHAT CONSTITUTES NEGLIGENCE

There is no definition in the act of "negligence" as a basis of liability. Consequently, the question at once arises as to whether its existence in any particular case is to be determined by the federal law or by state statutes and rules of decision.

It is submitted that the rule is established by repeated decisions of this court that in actions under the Federal statute the right of recovery is dependent

upon the principles of the common law, *as interpreted and applied in the federal courts*, and as modified *by federal statutes* prescribing safety appliances and other precautionary measures; that the right of action created by the statute can neither be broadened or limited by any state statute or rule of decision.

In *Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041*, we find this statement of the principles which govern the determination of what constitutes a right of action under the statute:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail, *and all state laws upon that subject were superseded.* Second Employers' Liability Cases, 223 U. S. 1, 55, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Seaboard Air Line v. Horton, 233 U. S. 492, 501, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475. *The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the federal courts.* The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed." (Italics ours.)

In support of the above, we would call attention to similar expressions in the following decisions:

> "And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." *(Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327.)*

> "But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded." *(Seaboard A. L. R. Co. v. Horton, supra.)*

> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal courts." *(Southern Ry. Co. v. Gray, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030.)*

> "In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery." *(New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167.)*

See also, *Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513.*

The statement that the nature and extent of the rights and obligations created by the act are dependent upon the applicable principles of the common law as interpreted and applied in the Federal courts, should be extended to include *federal* statutes prescribing safety appliances and other precautionary measures. As was pointed out in *San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110,* in upholding a right of recovery under the Employers' Liability Act for a violation of the Safety Appliance Act:

> "The Employers' Liability Act, as its 4th section very clearly shows, recognizes that rights of action may arise out of the violation of the safety appliance act. • • • The two statutes are *in pari materia*, and where the employers' liability act refers to 'any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the safety appliance act as 'negligence'—what is sometimes called negligence *per se*."

See also *Cent. Vt. Ry. Co. v. Perry (C. C. A.) 10 Fed. (2d) 132; Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.*

The necessary effect of what is said in the decisions above cited is to exclude from consideration, as a basis of any right of action under the federal act, state statutes and state rules of decision. This leads to a consideration of

III

SPECIFIC INSTANCES OF THE EXCLUSION OF STATE RULES OF DECISION AND STATE STATUTES AS A BASIS OF RECOVERY IN ACTIONS UNDER THE FEDERAL STATUTE

The leading case of *Seaboard A. L. R. Co. v. Horton, supra*, presents three separate instances of the exclusive nature of the Federal Act, so far as the applicability of a state statute or state rule of decision is concerned. In the first place, it was there held that a statute of North Carolina which imposed upon the employer an absolute liability for defects in machinery and appliances was without application in an action under the Federal Statute; an instruction based upon the North Carolina statute was condemned by this court upon the ground that "all state laws upon the subject are superseded."

A second question as to the application of a state law was also presented and decided in this case. A recovery was there sought because of an alleged defect in a water gauge and guard glass upon the engine on which the plaintiff was employed as an engineer. The North Carolina statute, as construed by the state supreme court, abolished the defense of assumed risk in an action for an injury attributable to defective appliances. Notwithstanding the fact that the particular appliance involved was not within the provisions of any federal safety appliance act, this court held that the North Carolina statute was without application, and therefore the refusal of the trial court to instruct on the defense of assumed risk was erroneous, it being said:

"It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject matter."

Finally, in construing the provisions of Sec. 4 of the act, abolishing the defense of assumed risks in cases involving a violation "of any statute enacted for the safety of employees," the court held that the phrase quoted included only Federal statutes, and not state legislation It was said:

"For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer."

In *New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167*, a statute of

Mississippi providing that proof of injury was *prima facie* evidence of negligence was held inapplicable to an action under the Federal act. This ruling was subsequently following in *Yazoo & M. V. R. Co. v. Mullins, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754,* and *New Orleans & N. E. R. Co. v. Scarlet, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752.* A similar conclusion as to a state rule of decision relative to the burden of proof on the defense of contributory neglect was reached in *Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.*

In *Toledo, St. Louis & W. R. Co. v. Slavin, 236 U. S. 454, 35 S. Ct. 306, 59 L. Ed. 671,* an Ohio statute abolishing the defenses of contributory neglect and assumed risk when an injury resulted from a defect in "rail, track, or machinery," was held without application to an action for injuries against an interstate carrier by an employee injured while engaged in interstate commerce.

New York Cent. & H. R. Co. v. Tonsellito, 244 U. S. 360, 37 S. Ct. 620, 51 L. Ed. 1194, involved the right of a father to maintain a common law action for loss of services of his son resulting from the latter's injury while employed by the railway company in interstate commerce. In denying any right of recovery, the court said:

> "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state."

In *Taylor v. Taylor, 232 U. S. 363, 34 S. Ct. 350, 58 L. Ed. 638*, it was held that the provisions of the federal act govern the distribution of damages recovered thereunder to the exclusion of state statutes of descent and distribution.

The case of *Spokane & Inland E. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125*, was an action under the federal statute. The defendant railway company sought to defeat liability upon the ground that the plaintiff's conduct was in violation of certain Idaho statutes rendering a wilful omission of duty, or wilful or negligent conduct, in the operation of trains, a criminal offense. In holding such defense to be without merit the court said:

> "Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield."

Closely analogous and controlling in principle, are those decisions of this court wherein it was held that an employee injured in interstate commerce was not entitled to an award under a state compensation act, even though, because of the absence of negligence, there was no right of recovery under the Federal statute. We refer to the cases of *New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045; Erie R. Co. v. Winfield, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057; New York Cent. R. Co. v. Porter, 249 U. S. 168, 39 S. Ct. 188, 63 L. Ed. 536; Southern Pacific Co. v. Industrial Accident Com., 251*

U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. 258; Philadelphia & R. Ry. Co. v. Hancock, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907.

It is submitted that the application to the case at bar of the conclusions reached and the principles announced, in the above cited decisions of this court, establish beyond doubt that the holding of the Kentucky Court of Appeals is in direct conflict with the now firmly established principle that the federal act "is comprehensive and also inclusive" *(New York Central R. Co. v. Winfield, supra)*, and "established a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce and in that field it is both paramount and exclusive" (Erie Railroad Co. v. Winfield, supra).

IV

THE REASONS UPON WHICH THE HOLDING OF THE KENTUCKY COURT IS BASED ARE UNSOUND

In the first place, the conclusion of the Kentucky Court is based upon the following syllogistic reasoning: That "the violation of section 331a-9 (Kentucky Statutes) is negligence"; that "the Federal Employers' Liability Act make a railroad company liable for negligence"; therefore, there may be a recovery under the Federal act for a violation of the state statute. Stated separately both premises are correct; stated together they have no relation one to the other, and the conclusion attempted to be drawn does not follow.

It may be conceded that the employment of the respondent in violation of the provisions of Sec. 331a-9

Ky. Stats. was "negligence"—what is sometimes called negligence per se. *San Antonio & A. P. R. Co., v. Wagner, supra; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.*

It may also be conceded that the provisions of the Federal act render a railroad company liable for "negligence" resulting in injury.

But "negligence" as descriptive of a violation of the state statute is not synonymous with, or included in "negligence" as used in the Federal act.

As hereinbefore pointed out the right of recovery under the Federal statute—and this necessarily involves a determination of what is, and what is not, negligence—depends upon applicable principles of the common law as interpreted and applied in the federal courts *(Chicago, M. & St. P. Ry. Co. v. Coogan, supra)*, and as modified or extended by federal statutes prescribing safety appliances and other precautionary measures *(San Antonio & A. P. R. Co. v. Wagner, supra)*. It is upon the existence of negligence as so defined, that liability under the Federal act depends. The employment of the respondent was not negligence at common law, nor was it prohibited by any act of Congress; it therefore follows that it was not "negligence" within the meaning of the Federal Act, and could not be made so merely because denounced by a state statute. It is expressly so held in *Seaboard A. L. R. Co. v. Horton, supra*, and in *Spokane & Inland E. R. Co. v. Campbell, supra*, and it is a conclusion that necessarily follows from the exclusion of state legislation

from the purview of the provisions of Sections 3 and 4 of the Federal act, which abolish the defenses of contributory neglect and assumption of risk in cases of violation "of any statute enacted for the safety of employees." See *Seaboard A. L. R. Co. v. Horton, supra.* So far as determinative of what constitutes negligence under the Federal Act, there can be no difference between a state statute and a state rule of decision; and it has been repeatedly held by this court that in ascertaining whether or not negligence exists in any particular case, the decision of a state court of last resort is not binding upon this court, but that the question is one to be determined in accordance with the applicable principles of the common law as interpreted by the Federal courts. See *Toledo, St. L. & W. R. Co. v. Allen, supra; Missouri Pac. R. Co. v. Aeby, 275 U. S. 476, 48 S. Ct. 177, 72 L. Ed. 351; Gulf M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370; Chicago M. & St. P. R. Co. v. Coogan, supra; Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; Ches. & Ohio Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914.*

It is obvious from the above that the Kentucky court erred in concluding that the Federal statute authorizes a recovery for a negligence which owes its existence, not to any principle of the common law or rule promulgated by a federal statute, but solely to state legislation as construed by the state court.

The real vice of the Kentucky decision lies in the following declaration as to the scope and effect of the Federal act:

> "That act (section 2) makes a railroad company liable in damages for 'injury or

death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.' That is the only provision of the act relating to negligence, and that provision would not supersede any law of a state defining negligence. * *

"Whether the railroad company is guilty of negligence depends upon the law of the state where the injury happened unless the law of the state is in conflict with the federal act."

In passing, it may be remarked that the Court of Appeals erred in assuming that the state statute, as construed and applied to the case at bar, was not in conflict with the Federal act; in ascribing to the state statute the creation of a right in an employee engaged in interstate commerce to maintain an action for damages resulting from a violation of its provisions, the state enactment makes an act negligent which is not so declared to be by the Federal statute; as so construed, it is in conflict with the act of Congress.

But the outstanding error of the decision is in the limitation placed upon the scope and effect of the Federal Act. While recognizing the supremacy of the act to the extent of any conflict with the state legislation, there is a denial that the act took possession of the entire field of liability of carriers by railway for injuries sustained by their employes in interstate commerce and superseded state laws upon that subject. In short, the Kentucky court while recognizing the supremacy of the act, denies its exclusiveness. Such holding is in direct conflict with the hereinbefore quoted utterances of this court in *Toledo, St. L. & W. R. Co. v. Allen*,

supra; Chicago, M. & St. P. Ry. Co. v. Coogan, supra; Seaboard A. L. R. Co. v. Horton, supra; Second Employers Liability Cases, supra.

In effect, though not in terms, the Kentucky court lays down the doctrine that in cases of injuries for which no right of recovery exists under the act of Congress, such act may be supplemented by state legislation. But such doctrine was definitely condemned by this Court in *New York Cent. R. Co. v. Winfield, supra.* and *Erie Railroad Company v. Winfield, supra.* Whatever uncertainty may theretofore have existed as to the exclusive nature of the Federal act was removed by the decisions in those cases. It was there sought to sustain the right of interstate employes to compensation under state compensation acts in those cases where, because of absence of negligence, there was no right of recovery under the Federal act. In denying the application of the state statutes this court in the first *Winfield* case said:

> "Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. Ed. 772, 777, 778, 13 Sup. Ct. Rep. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress * *
>
> "True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is

because Congress, in its discretion, acted upon the principle that compensation should be extracted from the carrier, where and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. • • •

"That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. • • •

"Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. • • •

"Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a resulation of the carrier's duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

And in the second *Winfield* case there was added this pertinent comment:

"It establishes a rule or regulation which is intended to operate uniformly in all the

states, as respects interstate commerce, and in that field it is both paramount and exclusive."

The manifest intention of Congress to establish a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees has been commented upon in other decisions of this court. Thus in *Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417*, it is said:

> "We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury."

And in *Seaboard A. L. R. Co. v. Horton, supra*, it was said that it was not conceivable that Congress "intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees."

See also *Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432.*

If a state may not confer upon an employee within the scope of the act the right to obtain compensation for an injury for which, because of the absence of negligence, there is no right of recovery under the Federal statute, it would seem to necessarily follow that a state may not confer upon such employee a right of recovery under the Federal statute itself for an act which the state, and not Congress, has declared unlawful. To hold otherwise would be to destroy the uniformity which Congress endeavored to obtain by the passage of

the act. It requires no great degree of imagination to picture the utter destruction of all uniformity in the scope and effect of the Federal statute if that act is to be made the vehicle for recoveries based upon the different legislation of the respective states regulating the age of employment, hours of labor, working conditions and other matters affecting the health and comfort of employees.

Neither can the decision of the Kentucky Court of Appeals be sustained upon the theory that the Kentucky statute as a state police regulation may supplement the provisions of the Federal act. The *Winfield* cases answer any such contention, for it was expressly held in *New York Cent. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247*, that the same law that was before the court in the first *Winfield* case *(244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045)*, could be upheld against an attack upon the ground that it impaired the constitutional guarantee of freedom of contract only upon the theory that it was "a reasonable exercise of the police power of the state." If more need be added, it may be found in the language of Mr. Justice Story in *Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. Ed. 1060, 1090:*

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it can not be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it

does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * * The will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

See also *Southern R. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257; Chicago R. I. & Pac. R. Co. v. Hardwick Farmers El. Co., 226 U. S. 426, 33 S. Ct. 174, 57 L. Ed. 284; Erie R. Co. v. New York, 233 U. S. 671, 34 S. Ct. 756, 58 L. Ed. 1149; Penn R. Co. v. Pennsylvania, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142; Napier v. Atlantic Coast Line R. Co., supra.*

V

THE MICHIGAN, CALIFORNIA AND ARKANSAS CASES

The precise question here involved was before the Supreme Court of *California in Smithson v. Atchison T. & S. F. Ry., 174 Cal. 148, 162 Pac. 111;* the Supreme Court of Michigan in *Petranek v. Minneapolis, St. P. & S. S. M. Ry. Co., 240 Mich. 655, 216 N. W. 467;* and the Supreme Court of Arkansas in *St. Louis-San Francisco Ry. Co. v. Conly, 154 Ark. 29, 241 S. W. 365.*

In the *Smithson* case, the action was under the Federal act, and the plaintiff sought to avoid the defense of contributory negligence upon the ground that his employment was in violation of the Child Labor Law of California. It was held that the state statute was without application to an action under the Federal act.

In the *Petranek* case, the suit was brought under the state law and a recovery sought for an alleged violation of a Michigan statute forbidding the employment of persons under 18 years in any hazardous occupation. The issue presented and the conclusion of the court was as follows:

> "Defendant offered evidence to show that at the time of the accident both plaintiff and defendant were engaged in interstate commerce. The evidence was rejected. This was error. If the accident arose while the parties were engaged in interstate commerce, plaintiff's cause of action, if any, was under the Federal Employers' Liability Act (45 USCA Secs. 51-59 U. S. Comp. St. Secs. 8657-8665), and plaintiff might not then rely upon a violation of a statute of the state as evidence or proof of negligence."

The *Condy* case was brought under the Federal act, and the instructions given by the trial court authorized a recovery if the employment of the plaintiff was unlawful under the state law. In holding such instruction erroneous the court said:

> "It is unnecessary to say more. Congress through the Federal Employers' Liability Act, has covered the entire field of liability of interstate carriers to their employees for injuries sustained by them while engaged in such commerce. It is unquestionably within the power of Congress under the commerce clause of the Constitution to prohibit carriers engaged in interstate commerce from employing minors under a certain age, and to make such carriers liable for any injuries sustained by such employees while engaged

in interstate commerce. Congress having such power and having entered on such field of legislation, state Legislatures covering the same subject-matter are as much bound by the silence of Congress as by what it has expressly declared within the scope of its power. As is pugently expressed by the Supreme Court of the United States in one of its cases, 'We may not piece out this act of Congress by resorting to the local statutes.' It is therefore wholly beyond the power of the state Legislature to make carriers engaged in interstate commerce civilly liable in damages for injuries to their employees while engaged in such commerce for the violation of some police regulation of the state. This power of Congress, under the commerce clause of the Constitution, does not in any manner trench upon or dislodge the police power of the states over their own local and internal affairs which are reserved to them under the Tenth Amendment to the Constitution. * * * * *

"But such power is altogether different, and occupies an entirely different field from the power to create a civil liability in favor of the employees of carriers while engaged in interstate commerce against their employers for the violation of some police regulation of the state. The former power the state possesses exclusively; the latter is possessed by Congress alone after it has once assumed jurisdiction over the subject."

VI

It is evident that the decision of the Court of Appeals of Kentucky, and the argument of the respondent herein, are based upon what is conceived to

be the holding of this court in *Frese v. Chicago B. & Q. Ry. Co., 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131.* If in that case it was meant to say that the rights and obligations of either the employer or the employee under the Federal act may be limited or enlarged by any state statute, then we frankly concede that such holding is in conflict with other decisions of this court, both prior and subsequent thereto. In *Spokane & Inland E. R. Co. v. Campbell, supra,* it is expressly held that an employee's right of action under the Federal Statute is not affected by his violation of a state statute. It is not to be presumed that the court intended in the *Frese* case, in the absence of any reference thereto, to overrule this decision as well as in effect to overrule the *Horton Winfield* and other cases hereinbefore cited. It seems to us that the *Frese* case should be read in connection with the prior decision in *Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732,* and the subsequent decision in *Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212.* Read together, these three cases lay down the unquestionably sound principle that it is contrary to public policy to permit an employee to recover for an injury which directly results from his failure to perform a primary duty owed by him not only to his employer, but to the traveling public as well. The duty which Frese failed to perform, while enjoined by the state statute, as the duty which Wiles failed to perform was enjoined by the rules of the railway company, would have been owed independent of the statute, just as the same duty was held to have been owed in the *Kennedy* case. In short, in all three cases it was the breach in the performance of a duty owed by the injured employee which defeated recovery—a

duty that in one case happened to be defined by general principles of law, in another, by the rules of the employer, in the other, by a state statute. The nature or character or source of the definition is of incidental importance, for the definition did not create—it merely defined the duty.

Respectfully submitted,

LEWRIGHT BROWNING,
Counsel for Petitioner.

BROWNING & REED,
Of Counsel.

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Supreme Court of the United States

October Term, 1927.

No. [redacted] 133

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Petitioner*,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR PETITIONER.

LEWRIGHT BROWNING,
Counsel for Petitioner.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

May It Please the Court:

Bearing upon the question as to the right of a state, under the guise of a police regulation, to supplement federal action, we would respectfully direct the court's attention to the following decisions, which are in addition to those cited on page 21 of petitioner's brief:

Northern Pac. Ry. Co. v. Washington, 222 U. S. 370, 32 S. Ct. 160;
Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439, 35 S. Ct. 304;
Charleston & W. Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 S. Ct. 715;

Kansas City So. Ry. Co. v. Van Zant, 260 U. S. 459, 43 S. Ct. 176;
Missouri Pac. R. Co. v. Stroud, 267 U. S. 404, 45 S. Ct. 243;
Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279;
Alabama, etc. Ry. Co. v. Jackson & E. Ry. Co., 271 U. S. 244, 46 S. Ct. 535.

Respectfully submitted,

LEWRIGHT BROWNING,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

RESPONSE TO PETITION FOR CERTIORARI

May it Please the Court:

The facts of this case are excellently stated in the opinion of the Court of Appeals of Kentucky in the case of C. & O. Railway Company vs. Stapleton's guardian, 223 Ky., 154; 3. S. W. (2nd) 209, (Advance Sheets). It is sufficient to say that the only question raised by petitioner is whether or not the employment of an infant by an inter-state carrier in violation of

a State Statute forbidding the employment of children under certain ages is sufficient evidence of negligence within the meaning of the term used in the Federal Employers' Liability Act, and whether or not such unlawful employment is sufficient evidence of negligence to authorize a recovery in action brought under the provisions of the Federal Employers' Liability Act to recover damages for injuries sustained by an infant while so employed in open violation of law by an inter-state carrier.

It is earnestly submitted for the respondent that in such a state of case the employment of an infant when prohibited by statute is not only negligence within the meaning of the term as used in the Federal Employers' Liability Act, but that it is negligence per se. The opinion of the Court of Appeals of Kentucky in this case expressly follows the case of Frese vs. Chicago B. & Q. R. Co., 236 U. S. 1; 44 Sup. Ct., 1; 48 L. Ed. 138, from which this case is not distinguishable, and we might well rest our brief in this case with a citation of that case, as we earnestly submit that it is a direct answer to the question raised by petitioner, and is conclusive of the question herein presented.

In that case it appeared that the plaintiff, an engineer was injured in a collision. He sued the railroad company under the Federal Employers' Liability Act. The evidence disclosed that the injury occurred in the State of Illinois, and that at the time of the accident there was a statute in force in that State which read as follows:

> *"All trains running on any railroad in this state when approaching a crossing with another railroad in this state upon the same level or when approaching a swing or draw bridge in use as such, shall be brought to a full stop before reaching the same and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is cleared".*

The evidence showed that the engineer who was the plaintiff in the action did not ascertain that the way was cleared before entering upon the crossing. In denying a recovery to the plaintiff in that case for a failure to observe the statute the Court said:

> *"Moreover the statute makes it the imperative duty of the engineer to positively ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty for it would be a perversion of the Federal Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more".*

In concluding the opinion in that case the Court said:

> *"There is not doubt that the Statute of Illinois applied to this case".*

We earnestly submit that for the same reasons, as stated in the case supra, the Kentucky Statute relied on by respondent applies to the case at bar. It was

a violation of a penal law for the petitioner to employ respondent; its disregard of the Statute was negligence per se. In the case supra the plaintiff was denied a recovery because he violated a statute, and this violation of the statute was held by the Court to constitute negligence as a matter of law. In the case at bar the admitted and conceded violation of section 331 a-9 Kentucky Statutes, by petitioner, is negligence per se under the Federal Act.

In the case supra this Court is announcing no new doctrine as it is now well established that the employment of an infant in violation of a state statute is negligence per se.

Thompson on Negligence, Vol 1, Page 10
Elk Cotton Mills vs. Grant, 140 Ga. 727; 79 S. E. 836; 48 LR. A. (N. S.) 656.
Clark vs. Wells-Elkhorn Coal Co., 215 Ky., 128; 284 S. W. 91.
L. & N. R. R. Co. vs. Lyons, 155 Ky., 316; 151 S. W. 971.

In the cases of Minneapolis-St. Louis R. R. Co., vs. Bornfolis, 241 U. S. 211; 36 Sup. Ct., 595; 60 L. Ed. 961, and C. & O. Railway Co. vs. Carnahan, 241 U. S. 241; 36 Sup. Ct. 594; 60 L. Ed. 979, it was held that certain statutes referred to in those opinions were applicable to actions brought under the Federal Employers' Liability Act. We do not think that these cases can be distinguished from the case at bar.

Petitioner criticises the ruling announced by the Court of Appeals of Kentucky in the case of C. N. O. & T. P. R. R. Company vs. Swan, 160 Ky., 458; 169

S. W. 886, and insists that it is in conflict with opinions delivered by this Court. We submit that the doctrine announced in the Swan case is a sound interpretation of the Federal Employers' Liability Act. Nor is it in conflict with any decisions from this Honorable Court. We say this, mindful of the three opinions which petitioner cites in its petition for certiorari, but when these cases are carefully read and studied, it will at once be seen that there is no conflict between the cases.

It is also maintained by petitioner that section 331 a-9 commonly known as the Kentucky Child Labor Statute, is superseded by the Federal Employers' Liability Act, but we direct the attention of the Court to the most potent fact emphasized in all the opinions of this Court on this subject that the Federal Act supersedes the State Statutes only where it is in conflict with the State Statute. This principle was followed and adopted by this Court in the case of Seaboard A. L. R. Co. vs. Horton, 233 U. S. 142; 34 Sup. Ct. 635; 58 L. Ed. 262, relied on by petitioner. In that case the following instruction given to the jury by the trial court was approved:

> "*Where the Federal Act is in conflict with the State Statute then the state law is superseded but if there is no conflict expressed by the statute of the United States, then the rule of the State prevails*".

Where, we ask, is the conflict between the Kentucky Child Labor Statute and the Federal Employers' Liability Act? There is no federal legislation regulating

child labor and in such a situation it is well settled that the silence of Congress on this subject permits the several states to enact laws on the subject.

12 C. J. 16-19

Missouri Pacific R. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612; 53 L. Ed. 352.

The mere grant to Congress of the power to regulate would not imply a prohibition on the States to exercise the same power; it is not the mere existence of such a power, but its exercise by Congress which may be incompatible with the exercise of the same power by the States.

Missouri Pacific R. R. Company vs. Larabee Flour Mill Co., 211 U. S. 612; 29 Sup. Ct. 214; 53 L. Ed. 352.

In the case of Salabrin vs. Ann Arbor R. R. Company, 194 Mich., 458; 160 N. W. 552, it was held that the violation by an inter-state carrier of a State Statute requiring all engines to be equipped with head lights was sufficient evidence of negligence to authorize a recovery in a suit brought under the Federal Employers' Liability Act.

Again in the case of Pennsylvania Co. vs. Stalker, (Ind.) 119 N. E. 163, it was held that the violation of a municipal ordinance by an inter-state carrier was sufficient evidence of negligence to authorize a recovery in an action brought under the Federal Act. In that case it is said in the opinion:

"The federal statute declares that employers within its scope shall be liable for negligence. It

does not specify what shall constitute negligence, but leaves that question to be determined in accordance with the established rules of law on that subject".

But the petitioner relies on the case of Seaboard A. L. R. Co. vs. Horton, 233 U. S. 492; 34 Sup. Ct. 492; 58 L. Ed. 1,062, but we earnestly submit that this case does not support its contention. In that case Horton, an engineer brought suit under the Federal Act to recover for an injury sustained by him. His engine was delivered to him without a guard glass, which was used for the purpose of preventing an explosion. The injury occurred in the State of North Carolina, and by the law of that state any person suffering injury by reason of a defect in the machinery or appliances of the company was entitled to maintain an action therefor. The lower court instructed the jury that the failure to furnish the guard glass was negligence.

A careful reading of this case will clearly show that the Court went no further than to hold that the Federal Act superseded the North Carolina Statute, because the Statute was in direct conflict with the Federal Act. By the terms of the State Statute a recovery could be had by any person injured by any defective appliance regardless of negligence. Under the Federal Act for such an injury negligence must be established. In the case at bar the employment of respondent by petitioner is negligence per se, and there is no conflict between the two statutes.

The cases of New York Central Railroad Company vs. Winfield, 244 U. S. 147; 37 Sup. Ct., 546; 61 L. Ed.

1,045; Erie R. Co. vs. Winfield, 244 U. S. 170; 37 Sup. Ct., 556; 61L. Ed. 1,057; New York Central Railroad vs. Porter, 249 U. S. 168; 39 Sup. Ct. 188; 63 L. Ed., 536 and Southern Pacific Company vs. Industrial Accident Co., 251 U. S. 259; 40 Sup. Ct., 130; 64 L. Ed. 258 are not in point. These cases merely hold that an employee engaged in Interstate Commerce is not entitled to an award under a State Compensation Act. It will be noted that the Federal Employers' Liability Act imposes liability only where the defendant is negligent. The State Statutes involved in the cases supra impose liability regardless of negligence. There is therefore a decided conflict in the two statutes, and the Federal Act necessarily superseded them. In the case at bar there is no conflict in the two statutes. While these cases announce good law, they can not and do not have any possible application to the facts existing in the case at bar.

The case of New Orleans and N. E. R. Co. vs. Harris, 247 U. S. 367; 38 Sup. Ct., 535; 62 L. Ed. 1,167 is not in point. In that case the Court held that a statute of the State of Mississippi providing that proof of injury was prima facie evidence of negligence, had no application to an action under the Federal Act. This opinion goes into the question quite exhaustively and finds as a matter of fact that there is a decided conflict in the Federal Act and the Statute therein involved, for it expressly holds that under one act the plaintiff to succeed must affirmatively establish negligence; while under the other he is only required to show a certain state of facts from which the

Statute will infer negligence. The basis of this case, as is ably pointed out in the opinion, is that the Federal Act supersedes the state statute for the reason that there is a direct conflict between the two statutes, and necessarily the Federal Act will in such cases control. In the case at bar, however, respondent affirmatively established the negligence of petitioner, and there being no conflict between the two statutes, the Kentucky Child Labor Act applies to this case.

Nor does the case of Toledo, St. Louis and Western R. R. vs. Slavin, 236 U. S. 454; 35 Sup. Ct. 306; 59 L. Ed. 671 support contention of petitioner. In that case it is held that the suit should have been brought under the Federal Employers' Liability Act and not under the State Statute, and that this question could be raised by a motion for a directed verdict. This is the only proposition for which this case can be considered, and no other question was therein decided or raised. The cases of Chicago, etc. R. R. Co. vs. Coogan, 271 U. S. 472, Southern Railroad Company vs. Gray, 241 U. S. 333, and Central Vermont R. R. Co. vs. White, 238 U. S. 507 are not in point. In none of these cases was there any question about the application of a State Statute to a suit under the Federal Employers' Liability Act raised or decided.

The case of Michigan Cent. R. Co. vs. Vreeland, 227 U. S. 59; 33 Sup. Ct., 192; 57 L. Ed. 417 merely holds that the right of action created by the Employers' Liability Act in behalf of an injured interstate employee is extinguished by his death. The Federal Act and the State Statute attempted to be invoked in that

case were held to be in conflict, and that therefore the statute of the State did not apply. This is an entirely different question than is presented in the case at bar.

None of the cases which petitioner cites from this Honorable Court, individually or collectively support its contention. In each of them the Court found that the State and Federal Statute were in conflict with each other, and therefore very properly held that the State Statute did not apply. In the case at bar there is no conflict between the two statutes. Congress has failed to enact any legislation in regard to child labor, and therefore the States still have the power to require interstate carriers not to employ children of tender years. The Federal Act does not define the term negligence as used in that act. It is negligence to employ an infant in violation of a State Statute. We therefore respectfully submit that none of the cases cited by petitioner sustain in any way its contention.

We have carefully read the case of St. Louis, Francisco Ry. Co. vs. Conley (Ark) 241 S. W. 365, cited by petitioner. This case stands alone and unsupported by any authority. The opinion starts out by saying that Congress has the power to prohibit children from working in inter-state commerce, and then announced the strange and unheard of doctrine, that by the silence of Congress on the subject, that the States can not prohibit child labor in so far as inter-state commerce is concerned. Notwithstanding the Conley case supra it is now well settled that the States can regulate inter-state commerce in so far as its en-

actments are not inconsistent with the action of Congress, and when Congress fails to act on any given subject, the States have this power until Congress acts.

Missouri Pacific R. R. Co. vs. Larabee Flour Mills Co. Supra.

The Conley case is in direct conflict with all the decisions of this Honorable Court. We submit that the case is predicated on faulty reasoning, and that it should be rejected as unsound.

The case of Smithson vs. Atchinson, T. & S. F. Ry. Co. 162 Pac. 111, relied on by petitioner is not in point. The Court merely holds in that case that the violation of a State Statute does not preclude a defendant in a suit brought under the Federal Employers' Liability Act from relying on the defense of Contributory negligence. At the time of the rendition of this opinion Contributory negligence was an absolute defense under the Federal Act. Under the State Statute Contributory negligence was not a defense if the Statute was violated. There was then a decided conflict in the two statutes, the one providing that Contributory negligence should be an absolute defense; the other with the provision that it should not be a defense. To say there is no conflict in the two acts therein construed is to ignore the very principle upon which the case was decided. In the Smithson case, the plaintiff did not rely on the violation of the statute as negligence, while in the case at bar respondent pleads and avers that the violation of such a statute is negligence. It will be noticed that in the instant case the Court

instructed the Jury both on contributory negligence and assumed risk. We therefore submit that the Smithson case relied on by petitioner does not in any way support contention of counsel.

Believing that the Petition for Certiorari is without merit, it is respectfully submitted for the respondent that the application therefor should be denied.

Respectfully,

GEORGE B. MARTIN,
JAMES AND HOBSON,
Counsel for Respondent.

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The violation by petitioner of Section 331 a-9, Kentucky Statutes, prohibiting the employment of children under sixteen years of age is negligence per se and is sufficient to authorize a recovery in an action brought under the Federal Employers' Liability Act to recover damages for an injury sustained by an infant while employed in violation of Section 331 a-9, Kentucky Statutes.

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Since there is no Federal legislation regulating the employment of children in inter-state commerce, the several states have the power to enact laws prohibiting the employment of children of certain ages in inter-state commerce.

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On Writ of Certiorari.

BRIEF FOR RESPONDENT.

JAMES & HOBSON,
GEORGE B. MARTIN,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

On Writ of Certiorari.

BRIEF FOR RESPONDENT.

MAY IT PLEASE THE COURT:

It is our purpose to extend briefly our response to the petition for certiorari.

Respondent was injured while actively engaged in an employment existing in violation of the Child Labor Law of the State of Kentucky.

Since the petitioner is a common carrier engaged in interstate commerce, and the respondent's employment was in such commerce, no compensation for his injuries is obtainable unless the Federal Employer's Liability Act affords relief.

That Act, as frequently stated in decisions, both

Federal and State, is "paramount" and "exclusive".

Cent. Vermont Railway Co. v. White, 238 U. S., 507; 59 L. Ed., 1433; 35 Sup. Ct. Rep. 865.

It gives a cause of action to an employee injured by negligence. Determination of liability, therefore, depends upon a proper understanding of the word "negligence" as used in the Act, the scope of its meaning as intended by Congress.

Remembering that the purpose of the Act was to widen the field of responsibility of the railroads to their employees as evidenced by the elimination of the fellow-servant doctrine and the limitation placed on the effect of contributory negligence, an intention to circumscribe the scope of actionable negligence should not be inferred.

The term was not used in the restricted sense indicating merely "want of care", but expresses the idea in common law terminology of civil liability for injury or death.

The negligence specified in the Act, creating liability, must be ascertained by applying principles of common law as interpreted by the Federal Courts.

Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S., 472; 46 Sup. Ct., 564; 70 L. Ed. 1041.

Cent. Vermont Railway Co. v. White, 238 U. S., 507; 59 L. Ed., 1433; 35 Sup. Ct. Rep., 865.

The pertinent inquiry in this case then is whether

negligence in Federal jurisprudence embraces the idea of civil liability arising solely from violation of a statute.

> "In a majority of jurisdictions it is stated as a general rule of law that the violation of a criminal or penal statute is actionable negligence or as frequently stated is 'negligence per se', or 'negligence as a matter of law.' "
>
> 20 R. C. L., Sec. 33, page 38.

> "Violation of statute forbidding employment of children is negligence per se when the violation is the natural and proximate cause of the injury."
>
> 18 R. C. L., Sec. 65, page 553.

> "And if the child is actively engaged in the duties of the employment, the unlawful employment is held to be the proximate cause of the injury."
>
> 18 R. C. L., Sec. 65, page 554.

> "Violation of the Federal Safety Appliance Act by an interstate carrier, is in itself 'negligence', rendering railway company liable for injury to employee under Employers' Liability Act."

> "If Safety Appliance Act is violated question of negligence in the general sense of 'want of care' is immaterial."

> *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476; 36 Sup. Ct. Rep. 626; 60 L. Ed. 1110.

> In *Union Pacific Ry. Co. v. McDonald*, 38 L. Ed., 434, 152 U. S., 262,

it was held that non-performance by the Railway

Company of a duty imposed by statute of guarding its slack pit, was a breach of its duty to the public and therefore evidence of negligence, for which it was liable if the injuries were the result of such violation.

> In *Hayes v. Michigan Central Ry. Co.*, 28 L. Ed., 410, 111 U. S., 242,

violation of a city ordinance was held to be evidence of negligence. In the two cases, supra, there was a breach of duty to the public. If the duty imposed had been for the especial benefit of plaintiff, as in the case at bar, the violation would have been negligence per se, rather than mere evidence of negligence.

In *Narramore v. C. C. C. & St. L. Ry. Co.*, 96 Fed., 298; 48 L. R. A., 74, it appeared that the Railway Company had violated an Ohio Statute requiring the blocking of switch frogs resulting in injury to plaintiff. The Court through Circuit Judge Taft, said:

> "We have held that the failure on the part of the railway company to comply with the statute was negligence per se, etc."

Other Federal cases so holding are *C. H. & D. Ry. Co. v. Van Horn*, 69 Fed. 139; *L. E. & W. Ry. Co. v. Craig*, 73 Fed., 642.

> "Where a statute imposes a duty upon a person for the protection or benefit of others, and he neglects to perform that duty, he is guilty of negligence, and is liable to those for whose protection or benefit it was imposed, for any injuries of the character which the statute is designed to pre-

vent and which were proximately caused by such negligence.

20 R. C. L. 38-39

C. H. & D. v. Van Horn, 69 Fed., 139

Lake Erie & W. Ry. Co. v. Craig (C. C. A.), 73 Fed. 642;

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Schlemmer v. B. R. & P., 205 U. S., 1, 15; 27 Sup. Ct. 407, 51 L. Ed. 681."

W. A. Hoover & Co. v. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881.

"A State statute requiring the stopping of trains approaching grade crossings and requiring those in charge of them positively to ascertain that the way is clear before proceeding to cross, applies in an action under the Federal Employers' Liability Act to recover for death of an engineer killed at a grade crossing because of disobedience of the statute."

"There is no doubt that the statute of Illinois applied in this case."

Frese v. C. B. & Q. Ry. Co., 263 U. S. 1; 44 Sup. Ct. 1; 68 L. Ed. 131.

"An employer of a boy under 15 years of age in a mill or factory in violation of General Code of Ohio Par. 12993, prohibiting such employment, cannot avoid liability for the injury or death of the boy, of which such employment was the proximate cause, on the ground of contributory negligence."

"If the plaintiff in error violated the provisions

of this section, such violation was negligence per se."

Star Fire Clay v. Budno, 269 Fed. 510-511.

"Where plaintiff, a boy between fourteen and sixteen, was injured in the course of his employment by defendant in a steel mill without a certificate required by Act Pa. April 29, 1909, Par. 8, making such employment illegal and a misdemeanor, it was also actionable negligence sufficient to sustain a recovery for the injuries."

"Section 11 of the Act makes violation of the Act a misdemeanor. This certificate the defendant did not have,—indeed, none had been issued,—and its employment of the non-aged plaintiff was without legal warrant and was therefore illegal. But for such illegal employment the plaintiff would not have been in defendant's works and would not have been injured. Under both Federal and State decisions such illegal employment evidenced want of care or negligence on the part of the defendant. *Ry. Company v. Van Horn*, 69 Fed. 139; *Railway v. Craig*, 73 Fed. 642; *Narramore v. Railway*, 96 Fed. 300; *Stehle v. Machine Company*, 225 Pa. 348; 74 Atl. 215; *Jones v. Caramel*, 225 Pa. 644; 74 Atl. 613; *Lenahan v. Pittston*, 218 Pa. 311; 67 Atl. 642; *Queen v. Dayton*, 95 Tenn. 458; 30 L. R. A. 82; *Starmes v. Albion*, 147 N. C., 556; 61 SE 525; 17 L. R. A. (NS) 602; *Nickey v. Steuder*, 164 Ind., 189; 73 NE, 117. To hold otherwise, and to say that employment in violation of the statute was not negligence would be to deprive children of the protection the law was designed to afford them."

Klicke v. Allegheny Steel Co., 200 Fed. 935.

In *Seaboard A. L. R. Co. v. Horton*, 233 U. S.,

492; 34 Sup. Ct., 635; 58 L. Ed. 1062,

this Court refused to give any effect to a North Carolina Statute, the violation of which caused injury to an engineman in the employment of the defendant Railway Company.

The State statute created a cause of action for injuries caused by defective machinery; the Federal statute allows recovery for injury or death resulting from defective machinery only when "due to negligence".

The two statutes being in direct conflict, the Federal Act must prevail with the result that the State statute in an action under the Federal act is ineffective for any purpose.

The exact question involved here was decided adversely to petitioner's contention in *Frese v. Chicago B. & Q. Ry. Co.*, 263 U. S., 1; 44 Sup. Ct. 1; 68 L. Ed. 131.

Petitioner's counsel dispose of this important case by saying that "The court was not there dealing with any attempt to broaden or add to the Federal act"; that this Court in that case in determining the question of plaintiff's negligence "referred" to an Illinois Statute.

This Court's treatment of the State statute was not so casual as counsel assumes.

It not only "referred" to the statute, but quoted it in full and decided that the engineman's violation of it was a complete defense to his personal representa-

tives' claim for damages for his death.

The case we have here is the Frese case turned around; there the plaintiff was denied recovery because her intestate's violation of a State statute caused his death; here the petitioner was held liable because it violated a State statute causing respondent's injury. The Kentucky Court of Appeals followed the Frese case and applied the State statute upon the authority of that case, where under identical conditions this Court said, "There is no doubt that the Statute of Illinois applied to this case."

The Illinois Statute, like the Kentucky Child Labor Law, and unlike the North Carolina Statute, considered in the Horton case, is not in conflict with the Federal Act. Neither the Illinois nor the Kentucky Statute broadens or adds to the Federal Act; both of them are consistent with it and can be applied without doing the least violence to its meaning.

It is true that the existence of a State statute may have an effect upon the result of a suit under the Federal Act, and thereby in a sense affect its uniformity of operation. So a railway company may affect its uniform operation by the adoption of rules relating to service of employees. Such rules may differ from those in force by other carriers, with the result that conduct in the service of one company which is contrary to a rule, might constitute negligence, whereas, the same conduct in the service of another, having none or a different rule, would not be so regarded.

But State laws and railway rules should not be ig-

nored, unless they are out of harmony with the Federal Act.

Federal law prevails, but under Federal law, violation of a valid and unconflicting State statute is negligence within the meaning of the Employers' Liability Act.

Respectfully submitted,

JAMES & HOBSON,
GEORGE B. MARTIN,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 133.—October Term, 1928.

The Chesapeake & Ohio Railway Company, Petitioner, vs. Tobe Stapleton, By His Statutory Guardian, Marion Stapleton.	On Writ of Certiorari to the Court of Appeals of the State of Kentucky.

[May 27, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

Plaintiff is a citizen of Kentucky, and at the time of the suit was between 15 and 16 years of age. Marion Stapleton was his father and guardian. The Chesapeake and Ohio Railway Company is a railway corporation of Virginia, doing an interstate commerce business in Kentucky. The plaintiff and his father were employed by the defendant as section hands and were engaged in maintaining the railroad and the roadbed for interstate commerce. The plaintiff was directed by his father, who was his foreman, to get water for his companions. In returning with the water he passed between or under the cars of a train standing on a switch track. The train moved unexpectedly while he was under the cars, he was run over and sustained permanent injury. The evidence showed that the boy was large and well developed and had been working as a section hand and water carrier for nine months previously.

The law of Kentucky in force at the time of the accident was Section 331a-9 Carroll's Kentucky Statutes, 1922, as follows:

"Children under sixteen; where not to work.

"No child under the age of sixteen years shall be employed, permitted or suffered (1) to sew or assist in sewing belts in any capacity whatever; (2) nor to adjust any belt to machinery; . . . (6) nor to work upon any railroad whether steam, electric or hydraulic; (7) nor to operate or to assist in operating any passenger or freight elevator. . . ."

Section 331a-16 of the same statute provided:

"Whoever employs or suffers or permits a child under sixteen years of age to work, and any parent, guardian or any adult person under whose care or control a child under such age is, who suffers or permits such child to work, in violation of any of the provisions of this act shall be punished for the first offense by a fine of not less than fifteen dollars and not more than one hundred dollars, or by imprisonment for not more than thirty days or by both such fine and imprisonment; for a third or any subsequent offense by a fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment. . . ."

Suit was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65. The case was tried to a jury and resulted in a verdict of $17,500. The Kentucky Court of Appeals affirmed the judgment. 233 Ky. 154. The case comes here on certiorari, and the error chiefly pressed is the giving of charge No. 3, as follows:

"The court instructs the jury that if they believe and find from the evidence that the defendant Chesapeake and Ohio Railway Company employed the plaintiff to work for it as a section hand at a time when he was under sixteen years of age, and if they further believe and find from the evidence that the plaintiff while working for it as a section hand in the course of said employment, was injured at a time when he was under the age of sixteen years, then the law is for the plaintiff, and the jury will so find. Unless they so believe they will find for the defendant."

The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act. *New York Central R. R.* v. *Winfield*, 244 U. S. 147, 150; *Erie R. R.* v. *Winfield*, 244 U. S. 170, 172. The question squarely presented here is whether the employment by an interstate carrier in Kentucky in the business of interstate commerce of a worker under the age of sixteen years is by reason of the State statute guilty of negligence justifying a recovery under the Federal Act for injuries received during such employment. Instruction No. 3 as given above dispenses with any burden on the part of the plaintiff to show that his injury was due to his age.

This Court, in the case of *Chicago, M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 474, said:

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. Second Employers' Liability Cases, 223 U. S. 1, 55; Seaboard Air Line v. Horton, 233 U. S. 492, 501. The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

In *St. Louis, Iron Mountain & Southern Ry.* v. *Hesterly*, 228 U. S. 702, it was held that the Federal Act saves a right of action to relatives for pecuniary loss sustained by the death of the one wrongfully injured, but does not permit a recovery for pain and suffering of the decedent, although in suits under the State law such a recovery may be had. See also *Michigan Central R. R.* v. *Vreeland*, 227 U. S. 59.

In *Seaboard Air Line* v. *Horton*, 233 U. S. 492, this Court held that a State statute as to assumption of risk does not apply to a suit for an injury under the Federal Employers' Liability Act, but only the common law on that subject as interpreted by the Federal courts.

In *New York Central R. R.* v. *Winfield*, 244 U. S. 147, Winfield was a section laborer in interstate commerce. He was tamping a cross tie and a pebble rebounded and hit his eye. He applied for compensation under a workmen's compensation act of the State. It was held that as his injury was not due to negligence on part of the railroad, and did occur in interstate commerce, the Federal Employers' Liability Act excluded recovery for it.

In *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, the action was brought in a State court of North Carolina to recover damages for the negligent killing of a locomotive fireman of the Southern Railway Company, lessee of the defendant. Under the law of the State, the North Carolina Railroad as lessor of the Southern Railway Company was held responsible for all acts of negligence occurring in the conduct of business upon the

lessor's road and its liability was extended to employees of the lessee, injured through the negligence of the latter. The State Supreme Court held that the Federal Employers' Liability Act did not apply. This Court reversing that court held that the Federal Employers' Liability Act did apply to the case and that the case should be submitted to the jury on the issue whether the fireman was engaged in interstate commerce at the time of death.

New Orleans & Northeastern R. R. v. *Harris*, 247 U. S. 367, was a suit for damages under the Federal Employers' Liability Act. It was there sought to apply a Mississippi statute making it *prima facie* proof of negligence that an injury was done by a locomotive engine. It was held that the State statute was inapplicable. See also *New Orleans & N. E. R. R.* v. *Scarlet*, 249 U. S. 528; *Yazoo & Mississippi Valley R. R.* v. *Mullins*, 249 U. S. 531; *Central Vermont Ry.* v. *White*, 238 U. S. 507; *Toledo, St. Louis & Western R. R.* v. *Slavin*, 236 U. S. 454; *Chicago, R. I. & P. Ry.* v. *Wright*, 239 U. S. 548; *Wabash R. R.* v. *Hayes*, 234 U. S. 86.

The exclusive operation of the Federal Employers' Liability Act within the field of rights and duties as between an interstate commerce common carrier and its employees has been illustrated in opinions of this Court applying that Act by quotation of the words of Mr. Justice Story in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, used in another association:

"If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it can not be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this Court, in the case of Houston v. Moore, 5 Wheat. Rep. 1, 21, 22, where it was expressly held that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for state legislation to add to the provisions of

Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

We come then to the specific question whether the violation of a statute of a State prohibiting the employment of workmen under a certain age and providing for punishment of such employment should be held to be negligence in a suit brought under the Federal Employers' Liability Act. That the State has power to forbid such employment and to punish the forbidden employment when occuring in intrastate commerce, and also has like power in respect of interstate commerce so long as Congress does not legislate on the subject, goes without saying. But it is a different question whether such a State Act can be made to bear the construction that a violation of it constitutes negligence *per se* or negligence at all under the Federal Employers' Liability Act. The Kentucky Act, as we have set it out above, is a criminal act and imposes a graduated system of penalties. There is nothing to indicate that it was intended to apply to the subject of negligence as between common carriers and their employees. It is true that in Kentucky and in a number of other States it is held that a violation of this or a similar State act is negligence *per se*, and such a construction of the Act by a State court is binding and is to be respected in every case in which the State law is to be enforced. *Louisville H. & St. L. Ry.* v. *Lyons*, 155 Ky. 396; *Terry Dairy Co.* v. *Valley*, 146 Ark. 448; *Grand Rapids Trust Co.* v. *Petersen Beverage Co.*, 219 Mich. 208; *Elk Cotton Mills* v. *Grant*, 140 Ga. 727. But when the field of the relations between an interstate carrier and its interstate employees is the subject of consideration, it becomes a federal question and is to be decided exclusively as such.

We have not found any case in which this question has been presented to the federal courts, but there are three or four well-reasoned cases in State courts, wherein this exact point is considered and decided.

In the case of *Smithson* v. *Atchison, T. & S. F. Ry.*, 174 Cal. 148, an action was brought under the Federal Employers' Liability Act by an employee against an interstate carrier. The California law provided that no minor under the age of 18 years should be employed between 10 o'clock in the evening and 5 o'clock in the

morning, and the trial court charged that if the jury believed from the evidence that the employment or permission to work at night hours contributed to his injuries, the plaintiff was not guilty of contributory negligence. This was held to be error because of the exclusive provisions of the Federal Employers' Liability Act.

In *Petranek* v. *Minneapolis, St. Paul & S. S. M. Ry.*, 240 Mich. 655, where an accident causing an injury to a 16 year old boy working for a railroad as a section hand occurred while the boy and railroad were engaged in interstate commerce, it was held that the plaintiff could not rely on the violation of a State statute forbidding the hiring of boys under 18 in a hazardous employment as evidence of negligence, but that in its exercise of its right to control means by which interstate commerce should be carried on, Congress dealt exclusively with the matter of employers' liability to employees for injuries occuring in that commerce.

In *St. Louis-San Francisco Ry.* v. *Conly*, 154 Ark. 29, plaintiff was a minor 15 years of age working for defendant railroad in interstate commerce and was injured therein. It was held that a State law prohibiting such employment could not supplement or change the rule as to negligence under the Federal Employers' Liability Act. The court said:

"It is therefore wholly beyond the power of the State legislature to make carriers engaged in interstate commerce civilly liable in damages for injuries to their employees while engaged in such commerce for the violation of some police regulation of the State. This power of Congress under the commerce clause of the Constitution does not in any manner trench upon or dislodge the police power of the states from their own local and internal affairs which are reserved to them under the 10th Amendment to the Constitution."

See also *St. Louis, Iron Mountain & Southern R. R.* v. *Steel*, 129 Ark. 520.

A similar case was *McLain* v. *Chicago Great Western R. R.*, 140 Minn. 35. In that case an action was brought by the plaintiff under the Federal Employers' Liability Act, and it was held that a city ordinance and police regulation limiting the speed of trains, having all the effect of a statute, could not be admitted as evidence of contributory negligence. The Supreme Court of Minnesota said:

"The Act covers the entire field under which the employer in interstate commerce shall be liable for injury to its employees

likewise engaged. It pertains solely to the relation of master and servant. It does not supersede state legislation outside of this field, nor does it deal with the duties and obligations of either to the public; but it does supersede all state and municipal legislation governing the circumstances under which the master while within the provisions of the Act, shall be liable for injury to the servant. It follows that the ordinance in question was superseded by the Act of Congress and was not admissible in evidence."

The citations from these State cases, four of them, seem to show that their effect is confined to the government of the relation between the employer and the employee, between the common carrier and the interstate commerce agent. A different rule might well apply where the issue and the litigation is with reference to the duties of the common carrier in dealing with the public, with passengers or with strangers. The cases cited were decided only after a full examination of the cases on the subject of the Federal Employers' Liability Act in this Court.

The cases chiefly relied on by respondent are cases which were decided before the Federal Employers' Liability Act was passed. A palpable instance of this is the case of *Narramore* v. *Cleveland, C. C. & St. L. Ry.*, 96 Fed. 298. It was a suit of which the Federal court took jurisdiction because of diverse citizenship of the parties, but it involved the application of an Ohio statute requiring railroads to block the frogs, switches, and guard rails on their tracks, on penalty of a fine. State statutes relating to duties of the railroad company as a common carrier and enacted to secure the safety of the public are obligations on the company in many ways; but they cannot encroach on the field occupied by admissible Federal statutes. Therefore the *Narramore* and other cases cited have no application to the present case because they did not involve the construction or effect of the Federal Employers' Liability Act. *Hover & Co.* v. *Denver & Rio Grande Western R. R.*, 17 F. (2d) 881; *Star Clay Co.* v. *Budno*, 269 Fed. 508; *Klicke* v. *Allegheny Steel Co.*, 200 Fed. 933; *Steel Car Forge Co.* v. *Chec*, 184 Fed. 868.

Prese v. *Chicago, B. & Q. Ry.*, 263 U. S. 1, is relied on by the plaintiff. In that case a State statute made it the duty of a locomotive engineer to stop his train within a certain distance of a crossing of another railroad and positively to ascertain that the

way was clear and that the train could safely resume its course before proceeding to pass the crossing. The duty was a personal one which could not be devolved by custom upon the fireman and it was held that the failure of the engineer to comply with the duty was a defense to an action for his resulting death brought by his administratrix under the Federal Employers' Liability Act. This was a crossing of two railroads, a crossing where appropriate precautions must be taken to avoid collision between railroad trains whether state or interstate. It was a situation dependent for public safety on the enforcement of the State law as against the employees of all railroads, state or interstate. The application of the State statute was not by way of enlargement or contraction of the Federal Employers' Liability Act. See *Solobria* v. *Ann Arbor R. R.*, 194 Mich. 458; *Pennsylvania R. R.* v. *Stalker*, 67 Ind. App. 329.

We think that the statute of Kentucky limiting the age of employees and punishing its violation has no bearing on the civil liability of a railway to its employees injured in interstate commerce and that application of it in this case was error.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.